

15
No. 83-1437-CFX
Status: GRANTED

Title: Jeffrey Marek, Thomas Wadycki and Lawrence Rhodes,
Petitioners
v.
Alfred W. Chesny, Individually and as Administrator
of the Estate of Steven Chesny, Deceased

ocketed:
February 29, 1984

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Peterson, Donald G.

Counsel for respondent: Montgomery, James D.

Entry	Date	Note	Proceedings and Orders
1	Feb 29 1984	3	Petition for writ of certiorari filed.
2	Mar 31 1984		Brief of respondent Alfred W. Chesny, etc. in opposition filed.
3	Apr 4 1984		DISTRIBUTED. April 20, 1984
4	Apr 23 1984		Petition GRANTED.
5	May 24 1984		***** Order extending time to file brief of petitioner on the merits until July 16, 1984.
7	Jun 6 1984		Joint appendix filed.
8	Jun 11 1984		Brief amicus curiae of Florida filed.
9	Jul 16 1984		Brief of petitioner Jeffrey Marek, et al. filed.
10	Jul 16 1984		Brief amicus curiae of Equal Employment Advisory Council filed.
11	Jul 16 1984		Brief amicus curiae of United States filed.
12	Jul 19 1984		Brief amicus curiae of City of NY filed.
13	Jul 25 1984	3	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Aug 7 1984		Order extending time to file brief of respondent on the merits until September 14, 1984.
16	Aug 23 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
17	Sep 12 1984		Brief amicus curiae of Comm. on the Federal Courts on Behalf of NY City Bar filed.
18	Sep 14 1984		Brief amicus curiae of American Civil Liberties Union, et al. filed.
19	Sep 14 1984		Brief amicus curiae of Lawyers' Comm. for Civil Rights Under Law filed.
20	Sep 14 1984		Brief amicus curiae of Alliance for Justice filed.
21	Sep 14 1984		Brief of respondent Alfred W. Chesny, etc. filed.
22	Sep 14 1984		Brief amicus curiae of NAACP Legal and Educational Fund filed.
23	Oct 10 1984		CIRCULATED.
24	Oct 22 1984		SET FOR ARGUMENT. Wednesday, December 5, 1984. (3rd case).

~~FILED~~

FEB 29 1984

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the defendants in a civil rights action are required to pay, under Title 42 U. S. C., § 1988, the plaintiff's attorney's fees as costs accrued after a valid offer of judgment under Rule 68 of the Federal Rules of Civil Procedure, when its offer of judgment has been rejected by the plaintiff and when the amount of the offer exceeds the subsequent judgment entered on verdict.

2. Whether fees recovered under a plaintiff's contingency contract should be disregarded by the district court in awarding "a reasonable attorney's fee" under Title 42 U. S. C., § 1988, when the contingency contract was never filed as required under General Rule 39 with the district court nor disclosed until oral argument on appeal.

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To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on November 3, 1983 and the denial of the petitioners' petition for rehearing *en banc* entered January 20, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was reported in 720 F. 2d 474 (7th Cir. 1983) and printed in Appendix A hereto *infra*, pages A-1-11.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 547 F. Supp. 542 (N. D. Ill. 1982) and is printed in Appendix B hereto *infra*, pages B-1-12.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A, *infra*, pages A-1-11) was entered on November 3, 1983. The jurisdiction of the United States Supreme Court is invoked under 28 U. S. C., § 1254(a).

On January 20, 1984, the United States Court of Appeals for the Seventh Circuit (Justices Bauer, Coffey, and Pell dissenting) denied the petitioners' petition for rehearing *en banc*. The denial is printed in Appendix C hereto, *infra*, page C-1.

STATUTES INVOLVED

United States Code, Title 42, § 1988 as amended. Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they

are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of § 1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

United States Code, Title 28, Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment which shall have the same effect as an offer made before trial if it is served within a

reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rules of the United States District Court, Northern District of Illinois Rule 39 appears in Appendix D.

STATEMENT OF THE CASE

Petitioners in this case are police officers of the Village of Berkley, a municipal corporation in Cook County, Illinois. (R. 1) The three officers were named as defendants in a civil rights action filed under 42 U. S. C., § 1983. The lawsuit was commenced in the United States District Court for the Northern District of Illinois on October 5, 1979. (R. 1)

On November 5, 1981, during the pendency of this suit, petitioners submitted a written Rule 68 offer of judgment to the respondent which stated: "Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of One Hundred Thousand (\$100,000) Dollars". This offer of judgment was not accepted by the respondent. (R. 144)

Commencing April 19, 1982 the civil rights case was tried to a jury. (R. 96) At the conclusion of a three week trial, the respondent asked the jury for its verdict in the sum of \$3,500,000. On May 11, 1982, the jury returned an itemized verdict for the respondent in sums which totaled \$60,000. (R. 120)

During the post-trial proceedings, the parties stipulated that the respondent's costs and attorney's fees incurred before the date of the offer of judgment in November, 1981, would be \$32,000. (R. 170) Subsequently, the respondent accepted that sum and was paid by petitioners, pursuant to order of court. (R. 170)

The respondent by post-trial motion, in the meantime, had demanded that petitioners pay his attorney's fees of approximately \$171,000 accrued for work performed after the offer of judgment. (R. 139) The district court in its opinion, printed in Appendix B herein, ruled that the respondent's failure to accept the offer of judgment required the respondent, not the petitioners, to pay respondent's own costs including attorney's fees accrued after the date of the offer of judgment. (R. 160) The district court held that the term "costs" in Rule 68 should include the term "attorney's fees" within the meaning of Civil Rights Attorney's Fee Act of 1976. Title 42 U. S. C., § 1988. (R. 160) § 1988 specifically provides that reasonable attorney's fees may be allowed "as part of the costs". District Judge Shadur held that the respondent is not entitled to receive payment for his attorney's fees accrued after November 5, 1981, the date of the offer of judgment. The district court held that the respondent had not obtained a judgment which was more favorable than the offer (*Chesny v. Marek*, 547 F. Supp. 542, 545 (N. D. Ill. 1982) (Appendix B-5) and that, therefore, under Rule 68 respondent must pay his own costs, including fees accrued after the date of the offer of judgment. (R. 160 and Appendix B-12)

The respondent appealed the decision of the district court to the Seventh Circuit Court of Appeals, which reversed. (R. 171) During oral argument before the Seventh Circuit, the respondent for the first time revealed that his client had executed a written contingent fee agreement with him. Violating a local rule of the Northern District of Illinois, the respondent's attorney had not submitted his contingent fee contract to the district court for filing with the complaint, nor did he at any time advise the district court of what he would receive under the separate contingent fee agreement of which he now revealed the existence. General Rule 39 for the Northern District of Illinois specifically requires that all contingent fee contracts be filed with the district court as soon as the complaint is placed with the clerk for filing. (Appendix D)

The Seventh Circuit, while reversing the district court's opinion, agreed with the district court that the petitioners' form of offer of judgment was valid in its inclusion of attorney's fees as part of the offer of judgment. *Chesny v. Marek*, 720 F. 2d 474 (7th Cir. 1983) The Seventh Circuit also found that the offer of \$100,000 was clearly more favorable than the subsequent jury verdict of \$60,000. Nevertheless, the Court of Appeals for the Seventh Circuit held that costs under Rule 68 should not include attorney's fees, because that would be in conflict with the congressional policy manifested in § 1988, Civil Rights Attorney's Fees Act. Petitioners filed a petition for rehearing *en banc* to which the Court of Appeals requested a response. After the response was filed the Petition for Rehearing was denied by majority vote, three justices dissenting.

In construing the "right" to attorney's fees under § 1988, the Court of Appeals held that such a right is of a substantive nature, not procedural and concluded that the respondent here is entitled to all fees accrued after rejecting the offer of judgment notwithstanding Rule 68 of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Seventh Circuit Has Nullified the Established Public Policy in Rule 68 of the Federal Rules of Civil Procedure, Which Is to Encourage Settlements, by the Court's Refusal to Enforce Rule 68 When It Would Bar a Claim for Certain Attorney's Fees in a Civil Rights Lawsuit.

The offer of judgment under Rule 68 of the Federal Rules of Civil Procedure in the hands of the trial bar has grown into a vigorous force to cut through litigation delays and expenses. Due to the provisions of the Rule itself, the frequency with which Rule 68 offers of judgment are made in any federal lawsuit cannot be directly demonstrated. An offer of judgment does not become part of the district court record unless it is either accepted by the plaintiff, resulting in entry of judgment by the clerk, or it is incorporated in the record in a post-trial proceeding to determine costs, as in the instant case. 28 U. S. C. Rule 68.

Rule 68 has been part of the Federal Rules of Civil Procedure for over 40 years, 28 U. S. C. Rule 68 (1938). (Amended effective 1948 and 1966) With the enactment of civil rights legislation, 42 U. S. C. §1983, §1988, it has become an actively used method of lawsuit resolution at the district court level. Its use in recent years is evidenced and manifested by the extensive number of judicial opinions being published, which have discussed Rule 68.¹ The language of the Rule itself is founded on previously existing state statutes from Minnesota (2 Minn. Stat. § 9323 [Mason 1927]); Montana (4 Mont. Rev.

¹ *Delta Air Lines, Inc. v. August*, 450 U. S. 346 (1980) (Rule 68 held not to require plaintiff's payment of defendant's costs when plaintiff loses Title VII case); *Fulps v. City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983) (Costs held to include attorney's fees in Rule 68 offer of judgment context of § 1981 litigation); *Pigeaud v. McLaren*, 699 F. 2d 401 (7th Cir. 1983) (Held if offer of judgment does not

(Footnote continued on next page)

Codes Anno. § 9770 [1935]); and New York (N. Y. Civ. Prac. Law § 177 [Cahill 1937]). Attorneys practicing in state courts today are also confronted with offers of judgment which are prevalent in state statutes.² In *Delta Air Lines, Inc. v. August*, 450 U. S. 346 (1980) Justice Powell, concurring with the majority opinion, recognized the importance of Rule 68:

On the other hand, parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits. The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature. (Footnote omitted). *Id.* at 363.

Rule 68's method of effective dispute resolution is not an unknown or novel theory.

Yet, despite the existence and use of offers of judgments in both the state and federal court systems, the Seventh Circuit in this case avers that plaintiff's civil rights attorneys should not be burdened with Rule 68, because it reasons in part that Rule 68 is old and has been "little known and little used." *Chesny v.*

(Footnote continued from preceding page)

mention attorney's fees, they will not be included in "costs"); *Bitsouni v. Sheraton-Hartford Corp.*, 52 LW 2354 (D. Colo. 1983) (prevailing plaintiff not entitled to his attorney's fees post-offer of judgment when verdict is less than offer); *Lyons v. Cunningham*, (costs include attorney's fees under Rule 68 in civil rights case); *Waters v. Heublein*, 485 F. Supp. 110 (N. D. Cal. 1979) (offer of judgment costs held to include attorney's fees in Equal Pay case); *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978) (Costs held to include attorney's fees when offer of judgment made).

² Ala. R. C. P. 68; Alaska Civ. R. P. 09. 60.015; Del. Sup. Ct. R. 68; Fla. R. C. P. 1.442; Ind. Stat. Anno. TR 68; Ky. Rev. Stat. Vol. 17, Rule 68; Miss. R. C. P. 68; Neb. Rev. Stat. § 25-906; Nev. R. C. P. 68; N. J. Rule 4:58-1; N. Mex. R. 68; No. Dak. Rule 68(a); Wisc. Stat. Anno. 807.01 [1] and [3].

Marek, 720 F. 2d 474, 475, 479 (1983). The *Chesny* opinion is silent in answer to the question of why Rule 68 is a dusty artifact of legal history. It does not mention that in civil rights suits Rule 68 has frequently been used in recent years, nor does it mention that the Rule has been the subject of extensive legal writing.³

By construing the term "costs" in the Civil Rights Attorney's Fees Act, 42 U. S. C. § 1988, not to include attorney's fees in the face of a Rule 68 offer of judgment, the Seventh Circuit creates untoward confusion. This confusion has potential disastrous and far reaching consequences to the effective federal administration of justice by undercutting one of the Federal Rules of Civil Procedure. The Seventh Circuit violates a fundamental principle of statutory construction: statutes must be construed so that they harmonize with one another and are applied in a consistent fashion. This rule of construction, when followed, implements the intent of the legislature. *Kokoszka v. Bedford*, 417 U. S. 642 (1974); *Bonner v. Coughlin*, 647 F. 2d 931 (7th Cir. 1981). The Seventh Circuit itself in *U. S. v. Professional Air Traffic Controllers, infra*, reasoned that . . . "in interpreting legislative history, there is a presumption that Congress was aware of the judicial construction of existing law," and that new legislation, therefore, is to be construed within the entire framework of federal statutes. *U. S. v. Professional Air Traffic Controllers*, 653 F. 2d 1134, 1138 (7th Cir. 1981). In so holding, the Seventh Circuit followed this Court's opinion in *Shapiro v. United States*, 335 U. S. 1 (1948). Now, however, in *Chesny v. Marek*, 720 F. 2d 474 (1983), the Seventh Circuit deviates from this established principle.

³ "*Delta Air Lines, Inc. v. August: The Agony of Victory and the Thrill of Defeat*" 35 Ark. L. Rev. 604 (1983); "Rule 68: A 'New' Tool for Litigation", 1978 Duke L. J. 889 (1978); Case Notes, 9 Fla. St. U. L. Rev. 671 (1981); "Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation," 16 Ga. L. Rev. 482 (1982); "Using and Abusing the Federal Rules," 7 Litig. 7-40 (1981); "Rule 68—Prevailing Defendants Not Within Purview of Rule 68," 51 Miss. L. J. 599 (1980-81). "Application of Offer of Judgment in Title VII" 2 Pace L. Rev. 331 (1982); "*Delta Air Lines, Inc. v. August: taking the teeth out of rule 68*" 43 U. Pitt. L. Rev. 765 (1982).

In this instance, § 1988 can clearly be harmonized with Rule 68 by adopting the district court's view that the plaintiff's attorney's fees be terminated as of the date of a Rule 68 offer of judgment when computing fees under § 1988. As in this case, if he prevails, plaintiff will always receive pre-offer fees. The district court's rationale would require that the plaintiff win less by judgment on verdict than the offer of judgment, and only then will Rule 68 come into operation. Thus, Rule 68 and § 1988 can exist in harmony.

The Seventh Circuit unintentionally has created a special class of attorneys who, because of the court's embrace, need not concern themselves with serious settlement attempts through the vehicle of Rule 68. If their client's claim is in some manner grounded in a civil rights statute, they are immunized from compliance with this provision of the Federal Rules of Civil Procedure.

The philosophy behind § 1988 that a plaintiff's civil rights attorney, as a "private attorney general", should vigorously pursue the vindication of meritorious civil rights actions is not questioned by petitioners. The Seventh Circuit, we believe correctly, cites with approval Senate Report No. 94-1011 (1976) as demonstrating the congressional intent that civil rights attorneys should not be deterred from bringing good faith litigation "by the prospect of having to pay their *opponent's* counsel fee should they lose." (Emphasis added). Indeed, a majority of the U. S. Supreme Court has already held in *Delta Air Lines, supra* that a winning defendant in a Title VII case, after an offer of judgment by defendant under Rule 68, will not be deemed to be a "prevailing party" for the purpose of shifting to the plaintiff the fee payment obligation of the defendant. The instant case, however, presents a different problem, because it concerns the shifting of plaintiff's, not defendant's attorney's fees. The Seventh Circuit finds, first, that the petitioners have submitted a valid and enforceable Rule 68

offer of judgment and have properly included plaintiff's fees. But the Seventh Circuit then enters previously unmapped and relatively unexplored territory in federal judicial policy to declare a new policy underlying § 1988. That policy is that Rule 68 should not be utilized so as to force plaintiff's civil right attorneys "to think very hard before rejecting [a valid Rule 68 offer of judgment]" *Chesny v. Marek*, 720 F. 2d 474, 479 (7th Cir. 1983) (Appendix A-8). Petitioners respectfully submit that attorneys before the federal bar should be expected to think very hard about and to comply with all the Federal Rules of Civil Procedure during the course of a lawsuit. Both justice and effective administration of the federal courts require uniform enforcement of Rule 68 in harmony with the policy of the Civil Rights Act.

The Seventh Circuit appears to have rendered its opinion by making a quantum leap from the premise of congressional concern expressed in Senate Report 94-1011 to the conclusion that attorneys of a certain category should not be forced to forego attorney's fees accrued during the trial, when they have rejected a settlement offer that was better than what the jury subsequently found their case to be worth. The expressed congressional intent behind § 1988 is not to abrogate the Federal Rules of Civil Procedure but to provide adequate compensation within the framework of those Rules for any attorney who brings a meritorious civil rights lawsuit. Logically, a "meritorious suit" should be one in which the plaintiff has every reasonable chance of becoming the "prevailing party" and thus collecting § 1988 fees.

The instant opinion of the Seventh Circuit would elevate these civil rights plaintiff's attorneys into a unique class of attorneys who in an economic sense can never lose. For example, in just one category of cases handled by civil rights attorneys, statistics show that for the period of June 30, 1982 to June 30, 1983 in Northern District of Illinois, 1076 lawsuits

were filed under the data category, "Civil Rights between private parties." 1983 *Annual Report of the Director of the Administrative Office of the United States Courts, for the Twelve Month Period Ending June 30, 1983*; Appendix to 1983 Annual Report, Table 3C. Most, if not all of these cases, would have the potential for attorney's fees being paid to prevailing parties' attorneys. 42 U. S. C. § 1988. The Seventh Circuit reports its awareness that there are between 75 to 90 statutes providing for the payment of attorney's fees. *Chesny, supra*, at 477. In these categories of lawsuits, the Seventh Circuit's failure to enforce Rule 68 under the *Chesny* holding will effectively eliminate a most practical facility for settlement of lawsuits. So long as the plaintiff's attorneys in these suits are assured that their economic livelihood will never be diminished when they choose to ignore Rule 68 offers of judgment, they will enjoy membership in a unique class of attorneys before the federal bar.

The Seventh Circuit's opinion has extinguished any utilization of Rule 68 by a defendant as a method of reaching a just and equitable settlement in any civil rights litigation. Rule 68 is no threat to competent plaintiff's counsel in a meritorious civil rights case. Petitioners suggest that the good judgment of plaintiff's counsel will determine whether an offer of judgment which includes his attorney's fees is an appropriate financial settlement of his client's case. The abrogation of a Federal Rules of Civil Procedure as a policy decision by the Seventh Circuit Court of Appeals, on the other hand, is a substantial deviation from the just and orderly administration of the courts. The Seventh Circuit by its decision rewards plaintiff's attorneys for post-offer of judgment legal work, which has been performed only because of an attorney's mistake in judgment and which legal services, anachronistically, produces a worse result for the client. The petitioners believe that the integrity of the Federal Rules of Civil Procedure justify review by this Court of this public policy abrogation of Rule 68 in the Seventh Circuit.

II. The Seventh Circuit's Decision in This Case Has Created a Conflict in the Circuits by Refusing to Hold That Attorney's Fees Are Included As Costs Under § 1988 Where Costs Are Subject to the Provisions of Rule 68.

Despite the plain language of Rule 68 and § 1988, the Seventh Circuit has ruled that attorney's fees are not to be included as part of the costs defined in § 1988. Under this holding, the plaintiff in a civil rights case is not now required to pay its own costs incurred under Rule 68 although the plaintiff obtained a verdict less than the offer of judgment. This holding by the Seventh Circuit presents a direct conflict with the holding by the Sixth Circuit Court of Appeals in *Fulps v. City of Springfield*, 715 F. 2d 1088 (1983). It also now leaves the Second Circuit facing a split in the circuits in the case of *Bitsouni v. Sheraton Hartford Corp.*, 52 LW 2354 (D. Conn. 1983). *Bitsouni* is now on appeal to the Second Circuit Court of Appeals, from the United States District Court of Connecticut. The holding in the instant case also conflicts with the concurring opinion of the Honorable Justice Powell in *Delta Air Lines, Inc. v. August*, 450 U. S. 346 (1980). This Court's majority opinion in *Delta v. August supra* reversed the Seventh Circuit's holding of a fee award to the defendant under Federal Rule of Civil Procedure 68, but the majority opinion did not address the issue now presented.

The recent Sixth Circuit Court of Appeals opinion in *Fulps v. City of Springfield, supra*, states the law as petitioners would seek its construction, if this Court issues a Petition for Writ of Certiorari to the Seventh Circuit. The Sixth Circuit in *Fulps* states:

Although there is no easy answer to the question whether in a Rule 68 offer of judgment in a civil rights case, the phrase "with costs then accrued" includes attorney's fees, we are inclined to agree with Justice Powell's analysis [in *Delta Air Lines v. August, supra*.] Other courts

which have considered the issue are divided. Two District Courts have concluded that the only reasonable accommodation of Rule 68 in the fees provision of the underlying statutes involves treating an offer for "costs than accrued" as including attorney's fees. See *Waters v. Heublein*, 485 F. Supp. 110 (N. D. Cal. 1979); *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978). . . .

When Congress drafted 42 U. S. C. § 1988, it described attorney's fees "as a part of the costs." Congress could have simply authorized the recovery of attorney's fees, but it chose to go further and characterize the fees as costs. Required as we are to construe the language of a statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs. *Id.* at 1092.

This rationale of the Sixth Circuit Court of Appeals opinion in *Fulps* appears sound. It is respectfully submitted that the Seventh Circuit in the instant case has ignored the policy and the clear language of § 1988, and instead, rationalized a decision by stating: "The legislators who enacted § 1988 would not have wanted its effectiveness blunted because of a little known rule of court promulgated almost 40 years earlier". *Chesny v. Marek*, *supra*, at 479. Under Senate Report 94-1011, the legislators did express the view that the effectiveness of § 1988 should not be blunted by requiring plaintiffs to pay their opponent's attorney's fees. But it follows by neither logic nor policy that plaintiff need not bear his own fees, nor that the legislators of the Civil Rights Act were unaware of the Federal Rules of Civil Procedure. As stated by this Court in *Delta Air Lines, Inc. v. August*, *supra*, at 352, the congressional intent behind Rule 68 for the past 40 years has been to encourage settlement of litigation. It would defy logic to believe that the concern of a plaintiff's attorney having to pay his own photocopy, deposition and postage charges subsequent to an offer of judgment in a civil rights case would induce him to accept any offer of judgment, when he believes that his case has any

chance at all of prevailing at trial. The Seventh Circuit's opinion, if it remains in conflict with the Sixth Circuit, has effectively stripped Rule 68 of any settlement potential it may have in a civil rights case by reducing the Rule to the point where the plaintiff is only faced with paying his own photocopying, postage and deposition costs, if faced with an offer of judgment in a civil rights case. The plaintiff's legal fees, for example, in *Chesny v. Marek* would now total approximately \$220,000 according to the respondent's response to the Petition for Rehearing in the Seventh Circuit Court of Appeals. His "costs" in regard to out-of-pocket expenses on the other hand total approximately \$1,000. (Appendix A-7)

The Seventh Circuit has now taken all risks of litigation away from the respondent's attorney by providing that no matter what he does with the offer of judgment, he will still recover every dollar of his attorney's fees.

The holding here is in conflict with *Bitsouni v. Sheraton Hartford Corp.*, 52 LW 2354 (D. Conn. 1983), decided by the United States District Court for Connecticut, approximately three weeks after the Seventh Circuit's opinion in *Chesny v. Marek* and now on appeal in the Second Circuit. In *Bitsouni v. Sheraton Hartford Corp.*, the district court held that under Rule 68, the costs incurred after the making of the offer would be construed to include the plaintiff's attorney's fees. *Bitsouni* is a case arising under Title VII of the 1964 Civil Rights Act, in which the plaintiff had rejected an offer of judgment for \$2,000, with costs accrued to that date. At trial, the plaintiff prevailed on her claim of sex discrimination and was awarded damages of \$171.10. The district court held that the costs of the attorney's fees incurred after the date of the offer of judgment would not be included as part of the plaintiff's attorney's petition for fees. As mentioned, *Bitsouni* is currently on appeal to the Second Circuit Court of Appeals.

Also in conflict with the Seventh Circuit's ruling is the opinion of the Honorable Judge Cannella of the Southern

District of New York issued October 19, 1983, in *Lyons v. Cunningham, et al.*, 79 C 3953. (unpublished opinion). In that case, an offer of judgment under Rule 68 had been made in a civil rights case and was refused. The district court held that attorney's fees will be included as part of the costs under § 1988, and held that the plaintiff's attorney's fees accrued subsequent to the date of the offer of judgment would be denied. Reasoning in an earlier Seventh Circuit opinion [*Pigeaud v. McLaren*, 699 F. 2d 401 (7th Cir. 1983)] was rejected. *Lyons v. Cunningham* finds that the better view in the majority of cases supports the conclusion that Rule 68 is effective in precluding the plaintiff from recovering his attorney's fees accrued after an offer of judgment. In part, the district court rests its conclusion on this Court's opinion in *Hutto v. Finney*, 437 U. S. 678 (1978) that attorney's fees awarded pursuant to § 1988 are part of the costs.

As well as conflict between Circuits, the Seventh Circuit in this case has created a conflict between Rule 68 and § 1988. While the Sixth Circuit has harmonized these two provisions, the *Chesny* opinion puts them beyond reconciliation. Due to the confusion which the Seventh Circuit's opinion creates, uniformity on this question is imperative. A considerable number of lawsuits have involved the question of prohibiting plaintiffs' attorneys from recovering their attorney's fees in this context, and divergent judicial responses should not be allowed to continue.

Pursuant to Rule 17 of the Supreme Court of the United States, the petitioners request that this Court exercise its supervisory jurisdiction over the Seventh Circuit Court of Appeals in resolving this crucial and important question of statutory construction.

III. By Refusing to Construe Attorney's Fees As Part of the Costs Under Section 1988, While Permitting the Plaintiff's Attorney to Claim a Contingent Fee Under an Undisclosed Contingent Fee Agreement, the Court Is Tolerating an Inappropriate and Unjust Enrichment to the Plaintiff's Civil Rights Attorney.

If the Seventh Circuit's opinion is allowed to stand, it will provide an avenue for unjust, windfall fees to plaintiff's civil rights attorneys. During the course of respondent's appeal, a previously undisclosed contingent fee agreement was found to exist between the respondent and his attorney. *Chesny v. Marek*, 720 F. 2d 474, 478. The respondent's attorney had failed to file his contingent fee agreement, with his Affidavit of Compliance under General Rule 39. This local rule for the Northern District of Illinois mandates that an attorney file a signed copy of his written contingent fee agreement, if any, when the complaint is filed with the clerk of the court. If no copy of the contingent fee agreement is submitted to the court, the attorney represents under oath that his compensation basis is on other than a contingent basis. (Appendix D) Here, the fee agreement was not filed by the respondent and was never disclosed to the district court.

Under the long standing principle established in *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), prevailing parties are ordinarily allowed to recover reasonable attorney's fees unless special circumstances would mitigate against such an award. The Second Circuit in *Zarcone v. Perry*, 581 F. 2d 1039 (2d Cir. 1978) stated that the *Newman* ruling should not be applied "woodenly without consideration of the underlying factors which generated it." *Id.* at 1044. Leaving aside the question of Rule 68's application to this litigation, most circuits recognize that contingency fee agreements are to be closely scrutinized for their effect on a § 1988 award of attorney's fees. This rationale follows the general principle that the courts will scrutinize contingent fee agreements in the

context of litigation. *Rosquist v. Soo Line Railroad*, 692 F. 2d 1107 (7th Cir. 1982); *Krause v. Rhodes*, 640 F. 2d 214 (9th Cir. 1981).

Addressing this general principle the Ninth Circuit in *Buxton v. Patel*, 595 F. 2d 1182 (9th Cir. 1979) held that denial of attorney's fees under § 1988 did not connote judicial abuse of discretion in the situation where adequate compensation was available to the attorney through the verdict. A further reach of the application of the principle is found in *Brown v. Stackler*, 612 F. 2d 1057 (7th Cir. 1980), where the court denied all attorney's fees under § 1988 in a case brought to enjoin the enforcement of Illinois statutes concerning prices advertised for eyeglasses.

The legislative intent in applying the general principle has been analyzed by the Tenth Circuit, in holding that a contingent fee agreement when coupled with the grant of attorney's fees under § 1988 may result in a windfall profit for attorneys. *Cooper v. Singer*, 698 F. 2d 929 (10th Cir. 1982). The opinion in *Cooper v. Singer*, *supra*, cited with approval Senate Report No. 94-1011 (October 1, 1976) which states that the congressional intent is to attract competent counsel, not to produce windfalls to attorneys hidden behind a fee award. The *Cooper* Court went on to say:

This caution against 'windfalls' for attorneys shows that Congress was exclusively interested in making civil rights actions more attractive to perspective plaintiffs. Congress was not trying to get these cases into court by making them lucrative to attorneys. Therefore, an award of attorney's fees which benefits a plaintiff's attorney rather than a plaintiff does not further congressional policy. *Id.* at 931.

Applying the principle here, the ruling of the Seventh Circuit contravenes this principle in awarding fees. The respondent has been unjustly enriched through utilization of § 1988 in conjunction with the newly revealed contingent fee agreement. The lawyer's rights, not the respondent's, are here at issue on this appeal. While reasonable attorney's fees serve public policy and should be allowed to attorneys for prevailing

parties, it is submitted that those reasonable fees in this instance already have been paid in full. To couple the award of any additional attorney's fees, due under Rule 68, with all amounts received under the contingent fee contract in this case will provide a windfall to the respondents' lawyer.

When the respondent answered the Petition for Rehearing in the Seventh Circuit Court of Appeals, the respondent revealed that he does have a contingent fee agreement at the rate of 45 percent to be paid from "all amounts recovered". The judgment on jury verdict in this case is \$60,000 and has been paid, with 45 percent paid to the attorney. The respondent's attorney in addition has been paid \$32,000 for his pre-offer of judgment attorney's fees (R. 170) with 55 percent to the client. Nevertheless, he is now claiming an additional \$141,000 for his post-offer of judgment fees which the district court denied as well as an additional \$38,000 for his fees on the appeal to the Seventh Circuit. These sums total \$271,000.

To look through the perspective of respondent's attorney's client for a moment, Mr. Chesny will be recovering 55 percent of all amounts, including fees, under his agreement with his attorney. This amount at 55 percent of all sums recovered would total a cash payment to the respondent of \$149,050 for a case that the jury considers to be worth only \$60,000. Perhaps even more grave is the fact that the respondent, Mr. Chesny, will receive attorney's fees from the petitioners, even though the respondent does not have a license to practice law. Illinois Supreme Court Rule 771 adopts Canon 3 of the Code of Professional Responsibility, Ethical Consideration 3-8 and DR 3-102, which states that an attorney should not practice law in association with a layman or otherwise share legal fees with a layman. The respondent, if the Seventh Circuit's opinion is undisturbed, may share legal fees with his attorney. If this fee method is being used to circumvent the jury verdict, it should not be countenanced. Yet that is the result of statutory fee awards in the face of contingent fee agreements.

CONCLUSION

The Seventh Circuit has significantly restricted the public policy purpose for use of Rule 68 of the Civil Rules of Procedure in civil rights litigation. The Seventh Circuit's opinion without modification undermines any serious settlement attempts by defendants in civil rights lawsuits. Although the Seventh Circuit has construed the logic of the district court to be a "wooden" application of statutory construction, the district court's logic and analysis places its opinion squarely in the majority of the district court and appellate court opinions which considered this issue. Rule 68 states that the offeree must pay the cost, if the resulting judgment is less favorable than the offer. Such is clearly the fact in this instance. § 1988 states that costs are to include reasonable attorney's fees. The offer of judgment made in this matter included reasonable attorney's fees as part of the costs. Due to the substantial departure from the public policy and from the clear statutory language of Federal Rules of Civil Procedure, Rule 68, the petitioners respectfully request that the United States Supreme Court exercise its power of supervision and resolve this important question of federal law.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2927

ALFRED W. CHESNY, Individually, and as Administrator
of the Estate of STEVEN CHESNY, Deceased,

Plaintiff-Appellant,

v.

J. MAREK, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79 C 4186—Milton Shadur, Judge.

ARGUED SEPTEMBER 30, 1983—DECIDED NOVEMBER 3, 1983

Before WOOD and POSNER, *Circuit Judges*, and GORDON,
Senior District Judge.*

POSNER, *Circuit Judge*. Rule 68 of the Federal Rules of Civil Procedure allows a defendant, up to 10 days before the trial begins, to "serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued." If the offer is rejected and "the judgment finally obtained by the offeree is not

* Hon. Myron L. Gordon of the Eastern District of Wisconsin, sitting by designation.

more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Little known and little used (see Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 890), Rule 68 has attracted attention recently as part of a broader interest in limiting the number of federal trials at a time of rising costs of litigation and unprecedented federal caseloads.

This case, a civil rights suit under 42 U.S.C. § 1983, involves the interplay between Rule 68 and statutes that allow a prevailing plaintiff to get his attorney's fees reimbursed by the defendant, specifically the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The Act provides that in a civil rights case the district "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Though no explicit distinction is made between plaintiffs and defendants, the Supreme Court has interpreted the statute as creating a presumption in favor of awarding fees to a prevailing plaintiff, *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937 (1983), but as not allowing a prevailing defendant to get his attorney's fees reimbursed unless the suit was frivolous, *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam). This distinction is supported by the legislative history. See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 6-7 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 3-5 (1976).

The defendants in this case made a timely Rule 68 offer "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND (\$100,000) DOLLARS." We must decide whether an offer that includes attorney's fees is valid under the rule, and if so whether the rejection of a valid Rule 68 offer more favorable than the judgment the plaintiff finally obtains prevents the plaintiff from getting an award of attorney's fees for any work done after the offer was made. Both are questions of first impression at the appellate level.

The district judge skipped over the first question because he misread the offer to be (in his words) "for \$100,000 plus costs and attorneys' fees then accrued." 547

F. Supp. 542, 545 (N.D. Ill. 1982). Since the jury's verdict (upon which judgment was entered) was for only \$60,000, it was obvious to the judge that the plaintiff had received a judgment that was less favorable than a valid Rule 68 offer. The judge then answered the second question "yes," and so awarded the plaintiff just the \$32,000 in attorney's fees and costs that the parties agreed the plaintiff had reasonably incurred up to the date of the Rule 68 offer. The judge refused, however, to award the defendants their attorney's fees, pointing out that section 1988 allows only the prevailing party's fees to be taxed as costs, and the defendants did not prevail; they did better than the plaintiff expected but it was the plaintiff who was the prevailing party, because the jury returned a verdict for the plaintiff and judgment was entered on the verdict. The plaintiff, hoping to get an award of fees for the time put in on the case after the Rule 68 settlement offer was made, has appealed.

The offer, even when it is read correctly, was more favorable to the plaintiff than the judgment he got. The parties agree that the offer was for \$100,000 *including* costs and attorney's fees accrued as of the date of the offer, but the sum of the jury's verdict (\$60,000) and the accrued costs and attorney's fees (\$32,000) is still less than \$100,000. We reject the argument that the relevant judgment amount is not just the amount of the jury verdict but that plus a reasonable attorney's fee for work done after the date of the settlement offer. Any such fee would, so far as appears, merely offset the costs to the plaintiff of the additional legal work required for the trial. A judgment for \$80,000 is not more favorable than a judgment for \$60,000 if the difference is merely compensation for the added legal expense of getting the bigger judgment.

Coming to the form of the offer, we note that Rule 68 does not say that the offer is to be just for an amount of damages; it is to be "for the money or property or to the effect specified," and it is hard to see why the "money . . . specified" or the "effect specified" cannot be an unliquidated sum such as attorney's fees accrued

as of the date of the offer. The rule does not, it is true, require the defendant to set a figure on costs; an offer of the money or property or to the specified effect is, by force of the rule itself, "with"—that is, plus "costs then accrued," whatever the amount of those costs is. But it does not follow that the defendant may not specify a figure inclusive of costs, if he wants, or of attorney's fees, which are not mentioned in the rule and which usually (almost always back in 1938, from when this part of the rule dates without substantive amendment) are not included in costs.

If the form of offer that the defendants used here was invalid, Rule 68 would be unusable in many and perhaps most cases where a statute authorizes an award of attorney's fees to a prevailing plaintiff. As Justice Rehnquist pointed out in his dissenting opinion in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 379 n. 5 (1981) (the case that decided that Rule 68 does not apply where the defendant rather than the plaintiff is the prevailing party), many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff. To get his clients to authorize him to make a \$100,000 settlement offer in this case the defendants' counsel represents to us that he had to be able to tell them that if the offer was accepted their liability would be at an end—that they would not be exposed to an additional liability of unknown amount for the plaintiff's attorney's fees. The potential liability was great; the plaintiff asked the district court to award him \$173,000 in fees. Although some cases are settled with the understanding that the district court may award attorney's fees on top of the settlement, many cannot be settled on that basis, because of the open-ended nature of such a settlement. Cf. *Cruz v. Pacific Am. Ins. Corp.*, 337 F.2d 746, 750 (9th Cir. 1964).

This point would not have occurred to the draftsmen of Rule 68. The award of attorney's fees to prevailing plaintiffs was uncommon in 1938, though not unknown—

the copyright, securities, and antitrust statutes all allowed such awards. See Payne, *Costs in Common Law Actions*, 21 Va. L. Rev. 397, 405 n. 23 (1935). But today a large number of federal statutes allow such awards. There is no up-to-date count but published compilations for the middle 1970s range from 75 to 90. Fortunately Rule 68 is not so inflexibly drafted that it cannot be interpreted in a way that will preserve its utility in an age of attorney-fee statutes. As we have seen, it is not inflexibly drafted at all. If the draftsmen did not foresee the application of the rule in cases where the plaintiff might be entitled to an award of attorney's fees if he won, neither did they preclude it.

True, the type of offer that the defendants made adds slightly to the burdens of our overworked district judges. It requires the judge not only to fix a reasonable attorney's fee but to determine how much of that fee accrued before the date of the judgment offer, if such an offer was made and was more favorable than the judgment the plaintiff received; this apportionment is necessary to determine whether the offer really was more favorable than the judgment. The burden on the district judge is masked in this case by the fact that the parties agreed on the amount of reasonable attorney's fees that had accrued; in some cases they will not agree. But since an attorney-fee award is based on number of billable hours, see, e.g., *Bonner v. Coughlin*, 657 F.2d 931, 934 (7th Cir. 1981) (per curiam), and the lawyer must keep detailed records of when those hours were incurred, *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (per curiam), at least where it is feasible for him to do so, cf. *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 612 n. 28 (7th Cir. 1982), it should not be difficult to apportion the award between pre-offer and post-offer work. It should not be more difficult, indeed, than the identical apportionment—of costs—that Rule 68 explicitly requires the judge to make (assuming the offer is silent on costs).

We respectfully disagree with the suggestion in Justice Powell's concurring opinion in the *Delta* case, see 450 U.S. at 364, that a lawyer faced with a Rule 68 offer that is inclusive of legal fees might have a serious conflict of interest in advising his client whether to accept it. There is a potential conflict of interest whenever a plaintiff and his lawyer have an ordinary contingent-fee contract and a settlement offer is made. Suppose a defendant offers \$100,000, the contingent fee is 30 percent regardless of when the litigation ends, and the lawyer is sure he can get a judgment for \$120,000 if the case is tried but knows that it will cost him, in time and other expenses, \$8,000 to try it. His client will be better off if the case is tried, for after paying the lawyer's fee he will put \$84,000 in his pocket rather than \$70,000 if it is settled. But the lawyer will be worse off, since his additional fee, \$6,000 (\$36,000 - \$30,000) will be less than the trial costs of \$8,000 that he must incur. He has a conflict of interest.

Yet problems such as these have not been thought (in this country at least) so serious as to require prohibiting or even closely regulating contingent-fee contracts. The market for legal services protects plaintiffs to some extent, as shown by the fact that contingent-fee contracts commonly entitle the lawyer to a higher percentage of the judgment if the case goes to trial; this is one way of dealing with the conflict of interest in our example. The form of offer in this case does not create a more serious conflict of interest. Indeed, in many cases where a statute allows the award of attorney's fees, the plaintiff and his lawyer will agree in advance to give the lawyer a specified percentage of the sum of the damages awarded by the jury and the attorney's fee awarded later by the judge. That of course is equivalent to a standard contingent-fee contract in a case where there is no attorney's fee statute. The plaintiff and his lawyers had a contingent-fee arrangement in this case, though its terms are not in the record and could be quite different from the above. See, e.g., *Lenard v. Argento*, 699 F.2d 874, 897 n. 21 (7th Cir. 1983). But even if the arrangement

here is that the lawyers are to receive a fixed share of any damages awarded and, on top of that, whatever attorney's fee the court awards, it would not create a serious conflict of interest. The plaintiff's lawyers would simply tell the plaintiff what he would net if he instructed them to accept the offer; if the plaintiff thought the lawyers were taking too much, he could ask the court to arbitrate the dispute, see *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020-21 (3d Cir. 1977). It would thus be like any other case where the plaintiff and his lawyer do not completely specify the fee beforehand: when a settlement offer is made, the lawyer, in advising the client whether to accept it, has to indicate how much the client will net after the lawyer's fee is subtracted. In the absence of disagreement, the court in this case would not have had to make an award of fees if the plaintiff had accepted the Rule 68 offer; acceptance of an offer that expressly covered attorney's fees would have been a waiver of the plaintiff's right to any court-ordered award.

We conclude that the form of offer in this case is valid. The next question is whether the plaintiff's rejection of the offer bars him from receiving an award of attorney's fees for work performed on the case after the offer was made. It is undisputed that if the offer was valid and more favorable than the judgment, the plaintiff cannot recover any of the usual taxable costs—filing fees and the like (see 28 U.S.C. § 1920)—that accrued after the offer was made; but these we are told are no more than \$1,000. The dispute is over whether "costs" in Rule 68 includes attorney's fees where a statute allows attorney's fees to be taxed as costs recoverable by the prevailing party.

The district court's conclusion that it does rests on the following rather mechanical linking up of Rule 68 and section 1988. Since this is a civil rights case, since Rule 68 refers to costs, and since section 1988 allows attorney's fees to be taxed as costs in civil rights cases, Rule 68 costs must include any section 1988 attorney's fees that might be awarded to the prevailing plaintiff. If, therefore, the plaintiff rejects a valid Rule 68 offer and later gets

a less favorable judgment, he cannot make the defendant pay him any of his attorney's fees that accrued after the date of the offer.

This approach, though in a sense logical, puts Rule 68 into conflict with the policy behind section 1988. Section 1988 was intended to encourage the bringing of meritorious civil rights actions, such as the present action, which resulted in a judgment for the plaintiff of \$60,000 for the death of his decedent at the hands of the three police officers who are the defendants. See *Hensley v. Eckerhart*, *supra*, 103 S. Ct. at 1937; H.R. Rep. No. 1558, *supra*, at 1, 3, 9; S. Rep. No. 1011, *supra*, at 2, 6. The effectiveness of section 1988 would be reduced if the rejection of a Rule 68 offer that turned out to be more favorable than the judgment the plaintiff eventually received prevented the plaintiff from getting any award of legal fees that accrued after the date of the offer. That would mean in this case that the plaintiff's lawyers would have either to collect an additional fee from the plaintiff, thus reducing his net recovery from the jury's \$60,000 damage award, or to swallow the time they put in on the trial. Either way, the next time they are faced with a similar offer they will have to think very hard before rejecting it even if they consider it inadequate, knowing that rejection could cost themselves or their client a lot if it turned out to be a mistake.

Placing civil rights plaintiffs and counsel in this predicament cuts against the grain of section 1988. "[P]rivate attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose." S. Rep. No. 1011, *supra*, at 5. By the same token they should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at the trial if they win, merely because on the eve of trial they turned down what turned out to be a more favorable settlement offer. See Note, *supra*, 1978 Duke L.J. at 901. Moreover, since 10 days before trial is merely the deadline for the offer, if it were made

right after the complaint was filed it might deter the plaintiff's lawyers from conducting any pretrial discovery.

The Rules Enabling Act, now 28 U.S.C. § 2072, provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right" Although no rule has ever been invalidated under this provision, Wright, *The Law of Federal Courts* 406 (4th ed. 1983), rules have sometimes been interpreted or their domain of application narrowed to avoid abridging substantive rights. This is what happened to Rule 3 in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949); see Wright, *supra*, at 385-86, 412, and to Rule 68 itself in *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980). Although the right to attorney's fees created by section 1988 is in one sense not "substantive" but "procedural," because it governs the relations between the parties to a lawsuit, in another sense it is more "substantive" than "procedural." It does not make the litigation process more accurate and efficient for both parties; even more clearly than the statute of limitations involved in *Ragan*, it is designed instead to achieve a substantive objective—compliance with the civil rights laws. This makes it more like a right to receive punitive damages (universally regarded as a substantive right) than like a right to take depositions. But no doubt the right is better described as both substantive and procedural, or as substantive for some purposes and procedural for others. Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). For present purposes it is substantive. When Congress authorized the Supreme Court to make rules of procedure for civil cases it did not authorize the Court to alter substantive policies (that is the force of the "shall not abridge" clause), such as those that underlie the right to attorney's fees created by section 1988, call that right what you will. But that is what the Court would (unwittingly) have been doing when it promulgated Rule 68 if the district court's interpretation of the rule were upheld. And the Rules Enabling Act to one side, section 1988 of its own force prevents

us from reading "costs" in Rule 68 to include attorney's fees. The legislators who enacted section 1988 would not have wanted its effectiveness blunted because of a little known rule of court promulgated almost 40 years earlier.

We are aware that the Advisory Committee on the Federal Rules of Civil Procedure proposed recently that Rule 68 be revised to require the offeree to pay the offeror's reasonable attorney's fees in all cases where the offer turns out to be more favorable than the judgment. See *Preliminary Draft of Proposed Amendments*, 98 F.R.D. 337, 353, 361-64 (1983). But the Committee did not discuss and may not have considered the possible impact of the proposed amendment on attorney's fees statutes such as 42 U.S.C. § 1988 that are intended to encourage particular kinds of litigation. In any event, the proposed amendment has not yet been approved, and the fact that it has even been proposed shows that the draftsmen could not have been confident that the district court ruled correctly in this case.

The Advisory Committee thought that unless the offeree is penalized by being made to pay the offeror's attorney's fees, Rule 68 will never become an effective tool for inducing settlements. See 98 F.R.D. at 353, 363, 365; cf. Note, *supra*, 1978 Duke L.J. at 890. The fact that Rule 68 seems to be so little used provides some support for the Committee's view, but against this it can be noted that, even narrowly construed, the rule's provision on costs creates an incentive for the defendant to make a reasonable offer and that once such an offer is on the table the plaintiff has a big incentive to accept it and thereby avoid the expenses and uncertainty of a trial. Cf. Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 304 n. 195 (1939).

Fulps v. City of Springfield, 715 F.2d 1088, 1091-95 (6th Cir. 1983), states, in apparent contradiction to our view, that the word "costs" in Rule 68 includes attorney's fees when there is an applicable statute such as section 1988 that allows attorney's fees to be taxed as costs to the winning party. But the issue in *Fulps* was different from

the issue here. It was whether a settlement offer for \$5,000 that unlike the offer in this case was silent on attorney's fees should be interpreted to include them, and we have no quarrel with the court's conclusion that it should not be. The court was not dealing with the question whether Rule 68 can be used to abrogate the right to attorney's fees that a plaintiff would otherwise have by virtue of section 1988. Incidentally, in *Pigeaud v. McLaren*, 699 F.2d 401, 403 (7th Cir. 1983), we recently read "costs" in Rule 68, contrary to *Fulps*, as excluding attorney's fees (as we do today, while recognizing that the issue in *Pigeaud*, as in *Fulps*, was different from the issue in this case). More nearly in point is *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761-62 (1980), where the Supreme Court held that "costs" in 28 U.S.C. § 1927 (which, as it then read, empowered the district court to assess additional costs against an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously") did not include attorney's fees in a civil rights case, even though section 1988 allows attorney's fees to be taxed as costs in such a case. No more should "costs" in Rule 68 be read to include attorney's fees in such a case.

We thus affirm the fee award insofar as it gave the plaintiff \$32,000 for his fees and costs incurred up to the date of the award, but we reverse insofar as the district court denied the plaintiff any award of fees for services beyond that date and we remand the case to the district court to determine a reasonable attorney's fee for those services. Circuit Rule 18 shall not apply.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

ALFRED W. CHESNY, etc., <i>Plaintiff,</i>	} No. 79 C 4186
v.	
J. MAREK, et al., <i>Defendants.</i>	

MEMORANDUM OPINION AND ORDER

Alfred W. Chesny ("Chesny"), individually and as administrator of the estate of his deceased son Steven, sued defendants under 42 U.S.C. § 1983 ("Section 1983") and a number of state tort laws based on the allegedly unlawful fatal shooting of Steven. After trial on the merits a jury found in part for Chesny and awarded a total of \$60,000 against defendants Marek, Wadycki and Rhode. Chesny now moves for an additur to the judgment as well as an award of attorneys' fees. Defendants move for judgment n.o.v. as well as an award of attorneys' fees. For the reasons stated in this memorandum opinion and order Chesny's motions are granted in part and denied in part and defendants' motions are denied.

Additur

Loss of Future Earnings

Though the jury failed to award Chesny any amount as compensation for the loss of Steven's future earnings, Chesny

claims he is entitled to such recovery as a matter of law.¹ Chesny's expert economist testified that based on Steven's wage rate at the time of his death (\$5.50 an hour), less a 30% deduction for personal consumption, the present value of his future lost earnings amounted to \$504,859.

But a plaintiff is not absolutely entitled to recover such future earnings in a death action. Recovery is limited to the damage suffered by the next of kin. That damage can take two forms:

1. what amount decedent would have spent on next of kin during his lifetime, and

¹ In part Chesny seeks to fault this Court for claimed error in the jury instructions on damages. That represents impermissible second guessing or sour grapes or both. Chesny's Instruction 46 was given as tendered. It directed the jury to "consider" three elements of damages (one of which was loss of future earnings) and said:

Whether each of these elements of damages has been proven by the preponderance of the evidence is for you to determine.

Chesny cannot complain if the jury took that instruction at face value and decided loss of future earnings had *not* been proved. Moreover, it was actually during the course of trial that our Court of Appeals decided *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982). Cross-examination of Chesny's expert economist by defense counsel, just a few days before this Court received the slip sheet opinion in *O'Shea*, had created the potential risk of an improperly high discounting of future earnings if the jury decided to award them. This Court therefore drew counsel's attention to the newly-decided case and drafted Court's Instruction 1 to deal with the proper calculation of such damages. Chesny's counsel specifically approved that instruction (drawn to avoid potential prejudice to his client) during the jury instruction conference (Tr. 155, May 10, 1982). It ill becomes counsel to assert error on that score. In legal terms, doctrines of either waiver or induced error (if it were error) dispose of that untenable argument.

2. what amount would have accumulated in decedent's estate by the time of his death.

Keel v. Compton, 120 Ill.App.2d 248, 256 N.E.2d 848 (3d Dist. 1970); *Denton v. Midwest Dairy Products Corp.*, 284 Ill.App.279, 1 N.E.2d 807 (4th Dist. 1936).

As to the first of those elements, there was ample evidence from which a jury could conclude Steven was not supporting anyone and his entire future earnings would have gone either into savings or personal consumption. Thus a jury could reasonably have limited its award to the amount (if any) Steven would have left in an estate at the time of his death (assuming a normal life expectancy).

As for the second factor, this Court also finds the jury could reasonably conclude Steven would not have left any money in his estate. It is true the testimony of Chesny's expert was that Steven would personally consume only 30% of his total future earnings and the remaining 70% would be left as an estate. Defendants offered no expert testimony on that score. But a plaintiff carries the burden of proof as to all damages, and the jury was entitled to reject the expert's testimony and draw its own conclusions.² This Court cannot overturn the jury's implicit determination that Steven would have left no estate at his death.

² Certainly a jury could rationally reject the 30% personal consumption figure as improbably low for a single man earning at an \$11,000 annual rate, living in his own apartment (of substantial size in an attractive building in a suburban residential neighborhood, all as viewed by the jury) and buying and owning an automobile. Indeed the evidence of Steven's having a savings account was coupled with testimony as to his having used his savings for the automobile and other personal acquisitions. In addition the jury could have considered Steven's spotty employment record since high school graduation, in-

(Footnote continued on next page)

Funeral Expenses

Chesny also claims the uncontradicted testimony demonstrated he was entitled to recover \$3,000 in funeral expenses. Defendants correctly contend that the verdict forms approved by Chesny's counsel, providing separate lines for separate categories of damages, asked only for the jury's listing of (1) compensatory damages for the constitutional injury and (2) lost earnings. They say Chesny failed to ask for pecuniary damages and therefore lost his chance to get recover for funeral expenses. [Sic.]

Under the circumstances Chesny cannot prevail:

1. If funeral expenses *could not* be within the "compensatory damages" awarded by the jury, Chesny effectively waived his right to their recovery by failing to provide a separate instruction for such an award.
2. If funeral expenses *could* be part of the "compensatory damages" award, the jury must be viewed as having included it within the damage award.

Once again (as with the issue described at n.1) Chesny wrongly seeks to exercise hindsight.

Defendants' Motion for Judgment N.O.V.

Defendants' motion for judgment n.o.v. is based on this Court's failure to instruct the jury on the requirements of the

(Footnote continued from preceding page)

volving sporadic work as a service station attendant and only a few months' work as a surveyor (at the \$5.50 hourly rate) before his untimely death. And of course an expectation of increased earnings in future years can rationally be matched by a jury with an expectation of correspondingly increased consumption. This is not of course to indicate what this Court's resolution of the evidence would have been had it, not the jury, been the trier of fact—but such substitution of judgment is not the Court's role on the current motion.

Illinois Criminal Code for police conduct. That failure does not constitute error because (1) federal law not state law establishes the proper standard of conduct and (2) in any case defendants have failed to point to *any* substantive difference between the standard of conduct outlined in the Illinois Criminal Code and the actual instruction given by this Court. Again the jury's resolution of the factual issues was rational. Accordingly defendants' motion for judgment n.o.v. and their related motion for fees and costs must be denied.

Fed. R. Civ. P. ("Rule") 68

Rule 68 provides:

At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and the evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Defendants made a proper Rule 68 offer of judgment to Chesny for \$100,000 plus costs and attorneys' fees then accrued. Because the eventual jury award was only \$60,000, Rule 68 comes into play. It poses several problems in the context of this case.

If Rule 68 is applicable, there is no doubt Chesny cannot collect from defendants any "costs" incurred after the date of the offer of judgment. That in turn poses the question whether "costs" as used in Rule 68 include attorneys' fees, preventing Chesny from recovering fees incurred after the date of the offer.

Chesny first contends Rule 68 should not apply because the \$100,000 offer was not reasonable in light of the nature of

this action. Rule 68 does not literally require a "reasonable" offer, but Chesny cites *August v. Delta Air Lines, Inc.*, 600 F.2d 699 (7th Cir. 1979) to support a reasonableness requirement.

In *August* the plaintiff eventually lost at trial after a nominal Rule 68 offer of judgment. Our Court of Appeals held Rule 68 would not apply because the offer was not a good faith attempt to settle the action. But the Supreme Court affirmed on entirely different grounds, *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). It held Rule 68 did not apply at all to a situation where a plaintiff lost a trial after a valid Rule 68 offer of judgment. Instead Rule 68 operates only where a plaintiff eventually prevails at trial but for an amount less than the offer of judgment. Chesny in essence argues the Seventh Circuit *August* rule should still apply in that event.

That reading is dubious at best in light of the Supreme Court's treatment of the issue. If a plaintiff wins at trial, but is awarded a judgment for less than the earlier Rule 68 offer, it is really a contradiction in terms to label that offer a sham. As the Supreme Court said, 450 U.S. at 355:

But the plain language of the Rule makes it unnecessary to read a reasonableness requirement into the Rule. A literal interpretation totally avoids the problem of sham offers, because such an offer will serve no purpose, and a defendant will be encouraged to make only realistic settlement offers.

Moreover, even if a reasonableness requirement were incorporated into Rule 68 this Court would find defendants' offer of \$100,000 met that test. In *August* the sham or unreasonable offer with which our Court of Appeals was concerned was a truly nominal offer whose only purpose was to put the plaintiff at peril under Rule 68. While Chesny might have been of the opinion the \$100,000 offer was low, and while defendants may well have been prepared to go higher in negotiations, the offer was certainly a good faith attempt to settle the action and not simply a sham designed to invoke Rule 68. That Rule must be held to apply here.

As already indicated, the real question then becomes whether attorneys' fees are part of the post-offer "costs" Chesny cannot recover. Authority on that question is sparse. Two early cases may arguably be said to support the proposition that costs under Rule 68 should not include attorneys' fees. *Gamlin Chemical Co. v. Dacar Chemical Products Co.*, 5 F.R.D. 216 (W.D. Pa. 1946); *Cruz v. Pacific American Insurance Corp.*, 337 F.2d 746 (9th Cir. 1964).³ But more recent cases stand for a different result when an underlying statute specifically provides for an award of fees as part of costs to a prevailing plaintiff.

In *Waters v. Heublein, Inc.*, 485 F.Supp. 110 (N.D. Cal. 1979) a plaintiff prevailed at trial after a Rule 68 offer of judgment, but like Chesny obtained a judgment for less than the offer. *Waters* involved the Equal Pay Act, which like Section 1983 permits an award of attorneys' fees to prevailing plaintiffs. "Costs" in Rule 68 were held to include fees for several reasons:

1. Under the statutory scheme the award of fees was treated as a component of plaintiff's entitlement to costs.
2. Case law under Title VII required an award of fees to prevailing plaintiffs unless there was a showing of special circumstances.
3. Defendant's offer of judgment had included an offer of costs and attorneys' fees then accrued.
4. Including fees within Rule 68's definition of "costs" would promote the policy of encouraging settlements.

See also *Scheriff v. Beck*, 452 F.Supp. 1254, 1260 (D.Colo. 1978).

³ *Cruz* however is doubtful authority at best. Indeed a California district court (bound by Ninth Circuit authority, as this Court is not) found *Cruz* not controlling and included attorneys' fees within Rule 68 costs. *Waters v. Heublein, Inc.*, 485 F.Supp. 110, 115 n.3 (N.D. Cal. 1979).

Two other cases lend support to the *Waters* position. In *Greenwood v. Stevenson*, 88 F.R.D. 225 (D. R.I. 1980) a Section 1983 plaintiff accepted a Rule 68 settlement offer, which defendants then contended did not include attorneys' fees. Prevailing Section 1983 plaintiffs are entitled to fees as part of costs under 42 U.S.C. § 1988. After analysis the *Greenwood* court said that were the matter a question of first impression the court would agree with *Waters* and include fees as part of costs in Rule 68. However the court felt bound to rule otherwise because of a First Circuit opinion (the district court sat in that Circuit) that held a motion for allowance of fees came under Rule 59(e) and was not part of a motion for costs under Rule 54. That underpinning for the anti-*Waters* conclusion has since collapsed, for the First Circuit opinion was reversed by the Supreme Court in *White v. New Hampshire Department of Employment Security*, 102 S.Ct. 1162 (1982). There the Supreme Court held a motion for fees was *not* properly made under Rule 59(e).

Finally this Court's own opinion in *Coleman v. McLaren*, 92 F.R.D. 754 (N.D. Ill. 1981) considered whether an accepted Rule 68 settlement had included fees as part of the costs offer. Although this Court held it had not, the opinion specifically pointed out the underlying statute in that case did not provide for an award of fees to a prevailing plaintiff.

There is much force in the *Waters* approach. Shortly after the Supreme Court decision in *White* our own Court of Appeals held attorneys' fees should be sought along with costs under Rule 54(d). *Spray-Rite Service Corp. v. Monsanto Co.*, No. 80-1621, slip op. at 34-35 (7th Cir. June 28, 1982). Because Section 1988 specifies attorneys' fees are awarded as part of "costs," it makes eminently good sense to give the same word the same content for Rule 68 purposes in a Section 1983 case.

It is true that one important policy consideration was not addressed by the *Waters* court. Section 1983 suits are civil

rights actions, which carry with them a strong policy of encouraging vigorous enforcement. Most Section 1983 plaintiffs cannot independently afford to pay counsel, who thus receive compensation—only if they prevail—under Section 1988. That creates a potential conflict of interest for a plaintiff's counsel faced with a Rule 68 offer of judgment. Already undertaking a risk of handling a case without compensation should he or she lose, counsel would now confront the added risk of conducting a trial without compensation should the eventual verdict be less than the offer of judgment. Because the offer of judgment must include fees accrued to that time, trying the case may present greater peril than potential benefit for the lawyer (as contrasted with the client). That creates a real possibility that a lawyer who genuinely believes (but is unsure) his or her client will receive more from a jury than from the Rule 68 offer of judgment might "sell out" the client to insure the lawyer's receipt of fees. Any such danger, always distressing, is doubly so in the context of enforcement of civil rights laws.

Despite that factor, after careful consideration this Court is persuaded to the *Waters* result. First, the *Waters* point of view is consistent with the literal language of Rule 68 and Section 1988 (as well as our Court of Appeals' ruling that fees should be sought under Rule 54 as part of "costs"). Second, such an interpretation will stimulate realistic settlement efforts before trials. Finally, the problem Chesny claims is presented by this case—and any consequent deterrence of civil rights actions—will rarely arise. It requires a combination of (1) a plaintiff's lawyer's reasonable assessment of the case as worth considerably more than defendant's offer and (2) an actual result less than that offer. This Court cannot be persuaded to adopt a wrong rule because the right one may have a harsh application in a few cases. Accordingly it holds that under Rule 68 Chesny cannot recover costs, including attorneys' fees, incurred after the offer of judgment.

Rule 68 poses one last problem suggested by the language (emphasis added):

the offeree must pay *the costs* incurred after the making of the offer.

To this point this opinion has dealt with the offeree's (plaintiff's) payment of his *own* costs. But the rule also raises the question whether the *defendants'* "costs" are also payable by the plaintiff—and if so, whether such "costs" include defendants' attorneys' fees.

As for the latter question, a "no" answer is readily reached. Defendants, having lost the case (albeit by less than they originally offered in settlement) are not thereby rendered "prevailing parties" under Section 1988. Their "costs" therefore do not include attorneys' fees. *Waters*, 485 F.Supp. at 117.

In fact the same conclusion reasonably follows as to defendants' "costs" in the conventional sense. As the Supreme Court said in *August*, 450 U.S. at 359 n.24:

Some commentators assume that the Rule, even when applicable, operates to deny costs to a prevailing plaintiff and not to impose liability for defendants' costs on that plaintiff.

It then quoted extensively from Wright & Miller, *Federal Practice and Procedure*, Moore's *Federal Practice* and a Virginia Law Review article. This Court agrees with the position taken by the cited authorities.⁴ It will not award defendants any costs against Chesny.

Fee Request

Chesny will obviously have to submit a revised fee request limited to fees incurred up to the time of the judgment offer.

⁴ *Waters*, 485 F.Supp. at 117, did come to a different conclusion.

However this Court can make the following comments at this time:

1. It will not permit an award for costs incurred for clerical and secretarial services. Those costs are part of an attorney's overhead and are included in the attorney's hourly fee. Awards for paralegal time are not analogous, for those expenses are customarily separately billed to a client.

2. It finds, based on the professional experience of Chesny's attorneys, that the hourly rates sought are reasonable.⁵

3. It rejects defendants' arguments that a reasonable amount of fees should be determined by looking either to defendants' fees or to an amount equal to one-third of the eventual award. Reasonableness of the time spent, in light of the factors identified in the case law, is the issue.

4. Defendants are of course entitled to an evidentiary hearing if they so desire. But fees generated by such a hearing are also compensable (and would be charged to defendants notwithstanding Rule 68). *Spray-Rite*, slip op. at 39. Under the circumstances it appears to be in the parties' mutual self-interest to resolve accounting and verification matters without requiring a formal hearing.

This Court will not make any determination at this time as to the reasonableness of the hours spent by Chesny's counsel or as to the possible use of a multiplier.

⁵ Defendants unfairly denigrate (although they disclaim that intention) the experience of Chesny's lead counsel as derived in "all criminal or quasi-criminal cases" (July 29, 1982 Mem. 13). In fact 1½ years of counsel's 25 years at the bar were spent in the massive *Hampton v. Hanrahan* litigation. In any case, this Court is well satisfied as to the quality of the representation afforded by lead counsel as well as his experience, and it finds the requested \$150 hourly rate for his time is very reasonable indeed.

Conclusion

Defendants' motion for judgment n.o.v. and attorneys' fees is denied. Chesny's motion for an additur is denied. Chesny's motion for fees as a prevailing party under Section 1988 is granted except that Chesny shall be entitled to fees and costs incurred up only until the time of the offer of judgment. Chesny's counsel shall submit a revised fee request on or before September 13, 1982. On or before September 20, 1982 defendants' counsel shall notify the Court and opposing counsel whether an evidentiary hearing will be required.

/s/ MILTON I. SHADUR
Milton I. Shadur
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 20, 1984

Before

Hon. WALTER J. CUMMINS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

ALFRED W. CHESNY, Individually, and
as Administrator of the Estate of
STEVEN CHESNY, Deceased,
Plaintiff-Appellant,

No. 82-2927 vs.

J. MAREK, et al.,
Defendants-Appellees.

Appeal from the United States
District Court for the North-
ern District of Illinois, East-
ern Division.

No. 79 C 4186

Milton Shadur, Judge.

ORDER

On November 17, 1983, defendants-appellees J. Marek, et al., filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and a majority of the active judges have voted to deny the suggestion for rehearing *en banc*.^{*} The petition is therefore DENIED.

^{*} Circuit Judges Pell, Bauer, and Coffey voted to grant a rehearing *en banc*.

APPENDIX D

**RULES OF THE UNITED STATES
DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS**

RULE 39. Affidavit Evidencing Ethical Conduct

(a) No attorney shall file any action or defense in this Court which has been illegally or unethically solicited by or for him or in connection with which he has personally or through another given or promised to give any valuable consideration, either to a party involved or to any other person. No attorney shall promise to pay or pay as consideration for his employment, the expenses of a party. Upon good cause shown, however, the Court may, after proper filing of a complaint, authorize the advancing or loaning of money to an indigent plaintiff by the attorney for court costs, medical and living expenses subject to reimbursement out of the proceeds of any settlement or judgment. No attorney shall split fees with a layman or prosecute or defend a claim in this Court which has been solicited for or by him for money, fee, commission or other remuneration. No attorney shall represent a party to any action in this Court on a contingent fee basis without compliance with the applicable provisions of subsections (d), (e) and (f) hereof. As used herein, "contingent fee basis" shall include any fee arrangement under which the compensation is to be determined in whole or in part on the result obtained. To show compliance herewith, every attorney except the attorneys for the U.S. or for any state or subdivision thereof, unless the attorney has an agreement with any state or subdivision thereof to handle such action on a contingent fee basis, shall file with the appearance, complaint, answer or other initial pleading a sworn statement on the affidavit form set forth in (c) below, together with a copy of the contingent fee agreement, if any, containing the information hereinafter provided. The Clerk of the Court shall furnish copies of the affidavit upon request.

(b) Upon the removal of any cause to this Court and simultaneously with the docketing thereof pursuant to 28 U.S.C. § 1441 et seq., the attorney effecting the removal shall file the affidavit evidencing compliance with this rule as aforesaid, together with any contingent fee agreement, and the attorney who filed the action in the Court from which it was removed shall file a similar affidavit and copy of any contingent fee agreement simultaneously with the filing of the first pleading, motion, or any other action that he takes in said cause in this Court. Failure to meet these requirements shall bar the said attorney from the proceedings until this provision is complied with. This paragraph shall not apply to attorneys for the U.S. or for any state or subdivision thereof unless the attorney has an agreement with any state or subdivision thereof to handle such action on a contingent fee basis.

(c) The affidavit to be furnished by the Clerk to counsel for completion as evidencing compliance with this rule shall be as follows:

Affiant is the attorney of record for

.....
(here insert all parties represented by affiant) and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception").

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee,

or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions or if none state "no exception"):

Affiant has filed contemporaneously herewith a signed copy of any written contingent fee agreement applicable to his compensation for representing the above-named party or parties in this action and represents that a signed copy thereof has been furnished to each party whom he represents; if no copy of a contingent fee agreement is filed herewith, affiant represents that his compensation for services in this case is not on a contingent basis.

.....
(Affiant)

Subscribed and sworn to before me this day of,
A.D. 19.....

.....
TITLE

(d) Any contingent fee agreement with respect to the representation of any party or parties to an action in this Court shall be in writing in such number as to provide one copy for each client, one for the attorney and one for the Court. The original and each copy shall be signed by the attorney and by each client. One signed copy shall be delivered or mailed to each client at the time of making the agreement. One such copy shall be retained by the attorney and one filed with the Clerk of this Court contemporaneously with the filing of the affidavit required by this rule. Any such contingent fee agreement shall set forth the precise method by which the fee is to be determined, including the percentage, or percentages, if any, to be applied in the event of settlement, trial or appeal, whether expenses are to be deducted before or after the contingent fee is calculated and any other factors relevant to the fee arrangement.

(e) If an attorney of record in an action in this Court enters into a contingent fee agreement with respect to the representation of any party or parties to such action after the date hereinbefore provided for so doing, he shall comply with the provisions of subsection (d) hereof and file a copy of such agreement with the Clerk of this Court within three days after entering into such agreement.

(f) Upon final disposition of the action by settlement, trial or otherwise, each attorney who has entered into a contingent fee agreement in connection with his services in any action in this Court shall prepare a closing statement setting forth in detail (1) the computation of the fee, (2) any expenses, (3) all sums received in the matter by the attorney from any source, (4) the distribution made thereof, and (5) any other information necessary to present a definitive statement of the application of the contingent fee agreement in the action. One copy of such closing statement signed by the attorney shall be delivered or mailed to each party represented by him and one such copy filed with the Clerk of this Court within ten days after receipt by such attorney of any sum or sums to which such contingent fee agreement is applicable. (Adopted February 9, 1971)

83-1437

Office - Supreme Court, U.S.

FILED

MAR 31 1984

NO. _____

ALEXANDER L. STEVAS.

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners

v.

ALFRED W. CHESNY, individually and
as Administrator of the Estate of
Steven Chesny, deceased,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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19 pp
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NO. _____

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Petitioners

v.

ALFRED W. CHESNY, individually and
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Steven Chesny, deceased,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This matter arises out of a lawsuit commenced in the United States District Court for the Northern District of Illinois on October 5, 1979. The suit involved the shooting death of respondent's son by petitioners responding to a call concerning a disturbance in the respondent's son's home in the Village of Berkeley, a municipal corporation in Cook County, Illinois.

On November 5, 1981, 25 months after the commencement of this case, petitioners submitted an offer of judgment which read as follows:

"Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorneys' fees, of \$100,000."

Respondent did not accept the offer.

Over six months later, on May 11, 1982,

the jury returned a verdict in favor of respondent in the amount of \$60,000. The respondent, by Post-Trial Motion, requested \$171,000 in attorneys' fees for all work done in the case. After some discussion with petitioners, respondent, in good faith, agreed to set the pre-offer portion of fees at \$32,000. At that point, petitioners argued to the District Court, inter alia, that the post-offer portion of fees should be disallowed because of the operation of Rule 68. The District Court ruled in petitioners' favor holding that the term "costs" as found in Rule 68 encompasses and limits attorneys' fees recoverable by a party under the Civil Rights Attorneys Fee Award Act of 1976. Title 42 U.S.C., Sec. 1988, when the judgment obtained is less favorable than the offer. Therefore, Judge Shadur (of the District Court) denied respondent's request for those

attorneys fees which accrued after November 5, 1981, the date of the offer of judgment. The District Court ruled that the judgment respondent obtained was less than the offer of judgment and that he could not recover as prevailing party attorneys' fees accrued after the date of the offer.

The respondent appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. The District Court's decision was appealed on a number of grounds and reversed. The Seventh Circuit found that the Rule 68 Procedural device should not be available for use to abrogate the strong congressional policy of Sec. 1988. It was held, therefore, that "costs" under Rule 68 should not include attorneys' fees under Sec. 1988.

Petitioners filed a Petition for Rehearing En Banc. In the Petition for Rehearing,

petitioners, for the first time, raised an issue as to respondents fee arrangement with this attorney suggesting that this was a basis for having the broader issue on appeal reheard. As a basis for their position, petitioners alleged that they learned of the fee arrangement for the first time during oral argument. In fact, respondent alluded to his contingent fee arrangement in his post-trial petition requesting attorneys' fees, of which petitioners were served a copy. Judge Shadur, in his November 16, 1981 Memorandum Opinion and Order, took note of the language in the affidavit of respondent's counsel referring to his contingent fee arrangement.

REASONS FOR DENYING THE WRIT

- A. The Seventh Circuit properly found that Rule 68 should not operate to abrogate the sound congressional policy evinced in the Civil Rights Attorney's Fee Award Act of 1976.
- B. The Advisory Committee on the Federal Rules of Civil Procedure is currently proceeding toward revision of Rule 68.
- C. This Court will not entertain appeals on issues which were not properly raised before the United States Court of Appeals.

ARGUMENT

A. The Seventh Circuit Properly Found That Rule 68 Must Not Operate to Abrogate the Substantive Congressional Policy Evinced in the Civil Rights Attorney's Fee Award Act of 1976.

As the Seventh Circuit aptly stated in holding that Rule 68 does not operate to limit post-offer of judgment attorney's fees:

"[P]rivate attorneys generally should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponents counsel fees should they lose. S.Rep. No. 1011, Supra at 5. By the same token they should not be deterred from good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at trial if they win, merely because on the eve of trial they turned down what turned out to be a more favorable settlement offer. See Note, Supra, 1978 Duke L.J. at 901."

Chesny v. Marek, 720 F.2d 474, 479 (1983).

Adopting a mechanical approach that "costs" in the Civil Rights Attorney's Fees Award Act, 42 U.S.C., Sec. 1988, means the

same as the word "costs" found in Rule 68 for the sake of avoiding confusion, misses the point. The key question is whether the conflicting congressional policies can be harmonized recognizing that it was the legislature, not the Seventh Circuit, that created a special class of private attorneys general.

In fully reviewing the applicable cases, legislative history and arguments, the Seventh Circuit recognized that the policy underlying the fee award of Sec. 1988 was intended to ensure the full vindication of the then existing civil rights. Rule 68 continued to have the same vitality as in cases where attorney's fee award for successful efforts are not available. Petitioners suggest to this Court that the Seventh Circuit has effectively eliminated the most practical facility for the settlement of lawsuits". Petitioners presumably believe,

therefore, that Rule 68 was designed specifically, if not exclusively, to settle civil right cases and no others. In reality the Seventh Circuit, through its decision, has mandated that Rule 68 have the same impact upon both civil rights and non-civil rights cases. Petitioners argue that the Seventh Circuit created a special class of plaintiff's attorneys.

The converse of petitioners' argument is that for Rule 68 to limit attorney's fees recoverable under Sec. 1988 creates a special class of civil rights defense attorneys, giving those attorneys a disproportionately strong weapon to use against civil rights plaintiffs' attorneys. Such power in civil rights defense attorneys has not been sanctioned by any law or policy, whether judicial or legislative. Indeed, it cuts directly against the grain of Sec. 1988.

Petitioners argue further that by virtue of the Seventh Circuit's decision, the class of civil rights plaintiffs' attorneys is unique in that it can never lose in an economic sense. Assuming petitioners mean "prevailing" civil rights plaintiffs' attorneys, such attorneys, in fact, are elevated to an even par with all others whose fees are contingent upon success.¹ Distinction can only be found in the legislature's determination that in order to induce private attorneys' general to vindicate fundamental

^{1/} See Dissent of Justices Rehnquist, Burger and Stewart in Delta Airlines v. August, 450 U.S. 346, 378, 67 L.Ed.2d, 287, 308 (1981), "To construe Rule 68 to allow attorney's fees to be recoverable [or limited] as costs would create a two-tier system of cost-shifting under Rule 68. Plaintiffs in cases brought under those statutes which award attorney's fees as costs would find themselves in a much different and more difficult position than those plaintiffs who bring actions under statutes which do not have attorney's fees provisions..."

rights, certain minimum fees for time spent must be guaranteed. It appears, therefore, that petitioners' true objection to the Seventh Circuit decision, in a logical sense, is that it failed to abolish Sec. 1988 entirely.

B. The Advisory Committee on the Federal Rules of Civil Procedure is Currently Proceeding Toward Revision of Rule 68

As noted by the Seventh Circuit in its Opinion, the Advisory Committee on the Federal Rules of Civil Procedure on August 23, 1983, proposed that Rule 68 be revised. The proposed revisions include changes with respect to the payment of attorney's fees. See Preliminary Draft of Proposed Amendments, 93 F.R.D. 337, 353, 361-64 (1983). Public hearings on the proposed revision were scheduled for January 18, 1984 and February 3, 1984.

While the initial proposal may seem contrary to the decision on appeal here, the committee did not have the benefit of the Court of Appeals' decision upon its preliminary draft. Likewise, it may not have considered, as yet, the impact of the proposed changes on attorney's fee statutes, such as 42 U.S.C. Sec. 1988

After the hearings and further changes, the proposed amendments will presumably be submitted to the Judicial Conference of the United States and/or this Court. Because, as petitioners point out in their argument, the case law construing Rule 68 is disjointed, it would best serve the interests of judicial administration at all levels to change or clarify Rule 68 through the aforementioned quasi-legislative revision process.

C. This Court Will Not Entertain
Appeals From Courts of Appeals'
Decisions When the Question Was
Not Properly Raised Below.

In a Petition for rehearing to the

United States Court of Appeals for the Seventh Circuit, petitioners, for the first time, raised the question of whether a particular attorney's fee arrangement (herein contingent fee) might have an impact on the question of whether Rule 68 should operate to limit attorney's fees under 42 U.S.C. Sec. 1988 in certain circumstances. Petitioners suggested that a "no" answer to the latter question created an unjust enrichment to some attorneys and therefore necessitates a review of the fee arrangements. Petitioners apparently assumed, therefore, that Rule 68 is an appropriate vehicle for policing attorney's fees arrangements as well as encouraging settlement of cases. Petitioners' assertions are without merit, substantively and procedurally. A true reading of the Petition for Writ of Certiorari discloses that petitioners have, by first raising this question in their Peti-

tion for Rehearing, failed to preserve the question for review by this Court. See San Pedro v. Canon Del Agua Co., 146 U.S. 120, 36 L.Ed. 911 (1892). Even assuming arguendo the substantive validity of petitioners' argument, it is forbidden to use the Petition for Rehearing as an afterthought to raise points overlooked or simply not argued earlier.² Anderson v. Knox, 300 F.2d 296 (9th Cir. 1962)

A close reading of petitioners' third argument in the Petition for Writ of Certiorari discloses that petitioners have abandoned their earlier position that the

^{2/} Petitioners' assertion that they first learned of the fee arrangement at oral argument is contradicted by their own Brief on Appeal, which included Judge Shadur's Memorandum Opinion and Order of November 16, 1981 acknowledging respondent's counsel's affidavit referring to that contingent fee arrangement.

respondent's contingent fee arrangement has an impact on the question of whether Rule 68 costs should include attorney's fees. Rather petitioners now raise a completely new question before this court, namely, whether respondent's fee arrangement is proper.

The law is well settled that the United States Supreme Court will not decide a point not argued by the parties or passed upon by the court below. DeSylva v. Ballentine, 351 U.S. 570, 76 S.Ct. 974, 3 L.Ed.2d 1079 (1959).

Consequently, the denial of the Petition for Rehearing by the Seventh Circuit was well grounded as that court gave full consideration to all relevant issues properly raised before it.

CONCLUSION

The United States Court of Appeals has found that respondent is entitled to receive

post-offer of judgment attorneys' fees under 42 U.S.C. Sec. 1988 regardless of whether the judgment finally obtained exceeds the offer. Such finding was made based on the strong legislative policy underlying Sec. 1988 and should not be disturbed absent further and impending legislation. The Petition for Writ of Certiorari should be accordingly denied.

Respectfully Submitted

James D. Montgomery, and
James D. Montgomery, Jr.
James D. Montgomery and Associates, Ltd.
39 South LaSalle Street
Chicago, Illinois 60603
Suite 1521

Counsels of Record
(312) 977-0200

JUN 6 1984

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

JAMES D. MONTGOMERY, JR.
JAMES D. MONTGOMERY
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PETITION FOR CERTIORARI FILED FEBRUARY 29,
1984; CERTIORARI GRANTED APRIL 23, 1984

BEST AVAILABLE COPY

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RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS:

Date	Filings-Proceedings
10-15-79	Filed 10-5-79 complaint.
10-15-79	Filed 10-5-79 civil cover sheet.
10-15-79	Filed 10-5-79 affidavit re rule 39.
11- 2-79	Filed 11-1-79 appearance of defendants J. Marek, Thomas Wadycki, L. Rhode, and Raymond M. Chapman, individually and as members of the Berkeley Police Department with that of Jack M. Siegel as attorney; affidavit re rule 39.
12- 4-79	Filed 11-9-79 (appearance of Village of Berkeley with that of Schaffenegger, Watson & Peterson as attorney) letter to Judge Leighton from Raymond M. Chapman, Chief of Police, Berkeley police dept. dated November 7, 1979 re appearance.
12-29-80	Filed 12-22-80 plaintiff's notice of filing; plaintiff's first amended complaint
4- 9-81	Filed 4-3-81 defendant's notice; motion in lieu of answer to First amended complaint; memorandum in support of motion of Village of Berkley
4- 9-81	Filed 4-3-81 defendant's notice; answer and affirmative defenses to first amended complaint
11- 5-81	Enter order dated 11-3-81: Plaintiff is to submit a modified version of the pretrial order by November 13, 1981. Pretrial conference date of November 6, 1981, is reset to November 17, 1981, at 4:30 p.m.—Shadur, J.

Date	Filings-Proceedings
11-30-81	Enter order dated 11-17-81: Pretrial conference held. Order discovery is reopened to Close December 31, 1981. Pretrial order to be submitted by January 25, 1982. Status hearing is set forth February 5, 1982, at 9:15 a.m.—Shadur, J.
11-30-81	Enter order dated 11-17-81: Trial is set for April 19, 1982, at 10:00 a.m. (Draft)—Shadur, J.
3-25-82	Filed 3-19-82: Plaintiff's Pretrial Memorandum.
3-25-82	Filed 3-24-82: Defendants Marek, Wadycki and Rhode's Motion for an Order to reset the due date for final pretrial order.
3-29-82	Enter order dated 3-26-82: Status hearing held. Parties are granted an extension of time to and including April 16, 1982, within which to submit pretrial order.—Shadur, J.
4-21-82	Enter order dated 4-19-82: Trial begins. Opening statements heard and concluded. Evidence heard in part on behalf of plaintiff.—Shadur, J.
4-22-82	Enter order dated 4-20-82: Trial resumed—jury.—Shadur, J.
4-21-82	Enter order dated 4-21-82: Trial Resumed—Jury.—Shadur, J.
4-27-82	Enter order dated 4-23-82: Trial resumed—Jury.—Shadur, J.
4-26-82	Enter order dated 4-26-82: Trial Resumed—Jury.—Shadur, J.
4-29-82	Enter order dated 4-27-82: Trial Resumed—Jury.—Shadur, J.

Date	Filings-Proceedings
4-29-82	Enter order dated 4-28-82: Trial Resumed—Jury.—Shadur, J.
5- 4-82	Enter order dated 5-3-82: Trial Resumed—Jury.—Shadur, J.
5- 6-82	Enter order dated 5-4-82: Trial Resumed—Jury. Further evidence heard in part on behalf of defendants.—Shadur, J.
5- 7-82	Enter order dated 5-5-82: Trial resumed—jury.—Shadur, J.
5- 7-82	Enter order dated 5-6-82: Trial resumed—jury.—Shadur, J.
5-12-82	Enter order dated 5-10-82: Trial Resumed—Jury. Closing arguments held and concluded. Jury instructed. Marshal sworn. Two alternate jurors discharged. Jury deliberations commenced. Jury deliberations continued to May 11, 1982, at 9:00 a.m.—Shadur, J.
5-13-82	Enter order dated 5-7-82: Motion of Defendant Leslie J. David for Directed Verdict at the close of Plaintiff's evidence is granted.—Shadur, J.
5-13-82	Filed 5-11-82: Jury Verdict forms.
5-13-82	Enter order dated 5-11-82: Jury Deliberations resumed and concluded Jury returns its verdict finding for plaintiff Alfred Chesny as administrator of the estate of Steven Chesny and against defendants Marek, Wadycki & Rhode and assessing compensatory damages against said defendants collectively, in the total sum of \$57,000.00 and assessing punitive

Date	Filings-Proceedings
	damages in the amount of \$1,000.00 against said defendants, Jointly and Severally. (Total Damages \$60,000.00). The Jury finds in favor of defendants Chapman and the Village of Berkeley and against plaintiff. Jury polled. Jury discharged. Enter Judgment on the verdict. Trial ends.—Shadur, J.
5-13-82	Enter 5-11-82, Judgment pursuant to Rule 58.—by the clerk.
5-13-82	Enter order dated 5-12-82: Order the four checks/drafts in the total sum of \$60,000.00 tendered by defendants Marek, Wadycki, and Rhode in open court and refused by plaintiff, are to be deposited with the Clerk of this Court. Further ordered that by stipulation of the parties, without prejudice, tht plaintiff Alfred Chesny may endorse said checks/drafts to the Clerk of this Court for the purpose of depositing the funds in an income/interest bearing account, under the supervision of the Clerk.—Shadur, J.
5-14-82	Enter order dated 5-13-82: By agreement, order the Clerk of this Court is directed to invest the 3 cashier checks and the certified check, heretofore deposited with the Clerk, at the 1st National Bank of Chicago in U.S. Treasury Bills for approximately 30 days. Said treasury bills to be renewed upon maturity until further order of this Court. The endorsement of Alfred W. Chesny of said checks, for purpose of investment only, is without prejudice to rights of any party, and is not to be construed as an acceptance of such

Date	Filings-Proceedings
	monies in full settlement of any claim. (Draft)—Shadur, J.
6- 1-82	Filed 5-21-82 Plaintiffs motion for Additur or in the alternative for a new trial on the issue of compensatory damages
6- 1-82	Filed 5-21-82 Memorandum in support of motion for Additur or in the alternative for a new trial on the issue of compensatory damages
6- 1-82	Filed 5-21-82 Plaintiff's motion to attorneys' fees and costs
6- 1-82	Filed 5-21-82 Affidavit of James D. Montgomery in support of Plaintiff's petition for attorneys' fees and costs
6- 1-82	Filed 5-21-82 Affidavit of Brenda A. Minor in support of Plaintiff's petition for attorneys' fees and costs
6-15-82	Enter order dated 6-10-82: Plaintiffs brief in support of post trial motions is due by June 18, 1982. Defendants answering brief thereto is due by July 9, 1982. Plaintiffs reply brief is due by July 16, 1982. The Court will rule by mail—Shadur, J.
6-24-82	Filed 6-18-82: Plaintiff's Notice; Addendum to memorandum in support of motion for additur or in the alternative for a new trial on the issue of compensatory damages
6-24-82	Filed 6-18-82: Plaintiff's Notice; Motion for extension of time to file amended motion for attorneys' fees and costs.

Date	Filings-Proceedings
6-24-82	Enter order dated 6-21-82: Plaintiff is granted an extension of time to and including July 1, 1982 within which to file amended motion for attorneys fees & costs. Defendants' response thereto is due by July 22, 1982.—Shadur, J
7/ 7/82	Filed 7/6/82: Plaintiffs amended motion for attorney's fees and costs
8/13/82	Filed 7-29-82 Memorandum of defendants in opposition to plaintiff's post-trial motion and in support of defendants' post-trial motion; Exhibits attached
8/13/82	Filed 7-29-82 Motion of defendants Marek, Wadycki & Rhode (untitled) re: the award of attorneys' fees and costs
8/13/82	Filed 7/30/82 Addendum to defendant's post trial memorandum
8-17-82	Enter order dated 8-13-82: Motion of Defendants, Marek, Wadycki and Rhode for leave to file addendum to post-trial memorandum is granted.—Shadur, J.
8-20-82	Filed 8/19/82 Notice; Plaintiff's reply to defendants' memorandum in opposition to plaintiff's post-trial motions and in support of defendants' post-trial motion
8-20-82	Enter order dated 8/19/82: Plaintiff is granted leave to file their reply to defendants' memorandum in opposition to plaintiff's post trial motions & in support of defendants' post trial motion, instanter.—Shadur, J.

Date	Filings-Proceedings
9/10/82	Enter order dated 9/3/82: Memorandum Opinion and order entered. Accordingly, defendants motion for judgment NOV and attorney's fees is denied. Plaintiffs motion for an additur is denied. Plaintiffs motion for fees as a prevailing party under Section 1988 is granted except that plaintiff shall be entitled to fees and costs incurred up only until the time of the offer of judgment. Plaintiffs counsel shall submit a revised fee request by September 13, 1982. On or before September 20, 1982 defendant's counsel shall notify the court and opposing counsel whether an evidentiary hearing will be required—draft—Shadur, J
±	
9/15/82	Filed 9/13/82: Revised attorney's fees and costs request filed by plaintiff
9/20/82	Enter order dated 9/15/82: On motion of plaintiff, Alfred Chesny the clerk of this court is directed to pay Alfred W Chesny as administra- of the estate of Steven Chesney the sum of sixty thousand (\$60,000) dollars heretofore deposited with the clerk of this court on May 13, 1982, together with any and all earnings thereon draft—Shadur, J
11/17/82	Filed 11/16/82: Clerks file copy of transcript of proceedings held before Judge Shadur on 5/6/82

Date	Filings-Proceedings
11/17/82	Enter order dated 11/16/82: Memorandum opinion and order entered. Accordingly, the sum of \$32,000 in costs including attorneys fees is awarded to be taxed in favor of plaintiff Alfred W Chesny and against defendants draft—Shadur, J ac
11/29/82	Filed 11/24/82: Plaintiffs notice of appeal re order dated 10/3/82 and 11/16/82 (\$70 paid)

RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

Date	Filings-Proceedings
1983	
3-30	Filed 15c appellant's brief.
5/24	Filed 15c appellees' brief. per order.
6/7	Filed 15c appellant's reply brief.
r8/11	ORDER: Argument set for 9/30/83 at 2:00 p.m., limited to 20 min. per side. Sep 8 1983 Briefs distributed to panel.
r9/30	Filed 0&6C appellant's citation of additional authority per CR11. Dist.
r9/30	Heard and taken under advisement.
r10/18	Filed appellant's citation of additional authority. Dist.
r10/20	ORDER: Motion of 10/17 granted, clk of this court to file the 0*3c of appellees' supplemental memo.
r11/3	Filed opinion by Judge Posner, affirmed in part, reversed in part and remanded.
r11/3	Order: Final Judgment, affirmed in part, reversed in part, and the case is remanded. Costs on appeal are awarded to appellant.
11/9	Filed Bill of Costs and Attorneys' fees of plaintiff-appellant, \$38,056.55
r11/17	Filed 15c defendants-appellees petition for rehearing w/sugg for rehearing en banc., Dist en banc.
r11/21	Filed appellees objections to plaintiff-appellant's bill of costs and attorneys' fees.

Date	Filings-Proceedings
1983	
r11/22/3	Filed motion to file supplement to petition for rehearing, filed by appellees.
r11/30	Order: Appellant's request for attorneys' fees on appeal shld be filed in the district court. Appellant is directed to resubmit an itemized bill of costs with this court on or before 12/12/83.
12/5	Filed clerk's copy of letter to appellant requesting 25c of his answer to the appellee's petition for rehearing w/sugg. for rehearing en banc. Petition is due 12/19/83.
v12-9	Filed appellant's bill of costs in amt. of \$296.55.
v12-12	Filed appellant's motion for clarification.
v12-14	ORDER: It is this court's preference that appellant file its request for attys.' fees in the dist. ct. If appellant is not satisfied with the determination in that court, then appellant file its request with this court.
r12/16	Filed 25c answer to the petition for rehearing w/sugg for rehearing en banc dist. en banc
1984	
1/20	Order: Petition for rehearing w/sugg for rehearing en banc, filed 11/17/3 is hereby denied.
r1/24	Filed plaintiff-appellant's amended Bill of Costs.
2/28	Filed appellees Motion for stay of mandate, pending notice from the Supreme Court of docketing petition for writ of certiorari

Date	Filings-Proceedings
r3/8	Filed notice from Supreme Court petition for cert filed 2/29 their #83-1437
1983	
3/9	Order: Motion filed 2/28 by counsel for appellees granted the mandate of this court is stayed. Petition for writ of certiorari was filed with the Supreme Court on 2/29.
r4/26	Filed Notice from the Supreme Court, Petition for Certiorari granted
r5/7	Mandate issued and most of rec ret'd. all #s

RULE 39 AFFIDAVIT IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, OF ATTORNEY WILLIAM HOLLAND OF 10/5/79

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ALFRED W. CHESNEY, et al.	}	No.
<i>Plaintiff(s)</i>		
vs.		
J. MAREK, et al.		
<i>Defendant(s)</i>		

**Affidavit Evidencing Compliance
With General Rule 39**

WILLIAM E. HOLLAND Affiant is the attorney of record for Plaintiff, Alfred W. Chesney, etc. and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"): NO EXCEPTION

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exception"): NO EXCEPTION

Affiant has filed contemporaneously herewith a signed copy of any written contingent fee agreement applicable to his compensation for representing the above-named party or parties in this action and represents that a signed copy thereof has been furnished to each party he represents; if no copy of a

contingent fee agreement is filed herewith, affiant represents that his compensation for services in this case is not on a contingent basis.

/s/ WILLIAM E. HOLLAND

(Affiant)

Subscribed and sworn to before me this 5th day of October, A.D. 1979.

/s/ illegible

Notary Public

A-16

OFFER OF JUDGMENT IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, BY MAREK, et al., SERVED 11/5/81:

November 5, 1981

James D. Montgomery, Esquire
39 South LaSalle Street
Chicago, Illinois 60603

RE: Chesny v. Marek, et al.
Case No. 79 C 4186

Dear Jim:

We hereby serve you our Offer of Judgment. Pursuant to the Federal Rules of Civil Procedure, this Offer is not filed with the Clerk of the U.S. District Court.

Very truly yours,

SCHAFFENEGGER, WATSON &
PETERSON, LTD.

by: DONALD G. PETERSON

DGP/dg
Enc.

cc: Baker & McKenzie
130 East Randolph Street
Chicago, Illinois 60601

A-17

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ALFRED W. CHESNY, Individually
and as Administrator of the Estate
of STEVEN CHESNY, Deceased,
Plaintiff

vs.

J. MAREK, Individually and as a
Police Officer of the VILLAGE OF
BERKELEY, et al.,
Defendants

No. 79 C 4186

Offer of Judgment

To: James D. Montgomery
Attorney for the Estate of Chesny
39 South LaSalle Street
Chicago, Illinois 60603

PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 68, the defendants, JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND (\$100,000) DOLLARS.

SCHAFFENEGGER, WATSON &
PETERSON, LTD.

by: /s/ DONALD G. PETERSON

SCHAFFENEGGER, WATSON & PETERSON, LTD.
*Attorneys for Defendants Jeffrey Marek,
Thomas Wadycki and Lawrence Rhode*
69 West Washington Street
Chicago, Illinois 60602
346-5430

**AFFIDAVIT OF MAY 21, 1982 IN THE UNITED STATES
DISTRICT COURT, NORTHERN DISTRICT OF IL-
LINOIS, OF JAMES D. MONTGOMERY IN SUPPORT
OF PLAINTIFF'S PETITION FOR ATTORNEYS' FEES
AND COSTS:**

RECEIVED
MAY 21, 1982
MILTON I. SHADUR
U. S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ALFRED W. CHESNY, individually,
and as Administrator of the Estate
of Steven Chesney, Deceased,
Plaintiff,

vs.

J. MAREK, et al.,
Defendants

No. 79 C 4186
Hon. Milton Shadur

**Affidavit of James D. Montgomery in Support of Plaintiff's
Petition for Attorneys' Fees and Costs**

JAMES D. MONTGOMERY, upon being duly sworn on
oath, do depose and state as follows:

1. I am one of the attorneys for the plaintiff in *Chesny v. Marek, et al.*, 79 C 4186, and I have represented the plaintiff since this litigation began.

2. Since my involvement in this case began, I have spent a total of 628.50 hours on this matter, which includes both pretrial and trial work, up to the time of verdict. (See the forthcoming Statement of Attorneys Time.)

3. I have not received any fees for my services in this litigation, and any fees I would be entitled to were and are contingent upon the outcome of this cause, and 42 U.S.C., Sec. 1988.

4. I received a J.D. from the University of Illinois, Urbana, in 1956.

5. I have been a licensed attorney since November, 1956. I am currently licensed to practice before the Supreme Court of Illinois, the United States District Court for the Northern District of Illinois, the United States Court of Appeals, District of Columbia Circuit, the Seventh Circuit Court of Appeals, and the Supreme Court of the United States. I have practiced before various courts in Indiana, Iowa, Michigan, California, South Carolina and Nevada, in addition to the 25 years of litigation experience before the aforementioned courts.

6. I am currently the President and principal attorney of James D. Montgomery and Associates, Ltd. My firm specializes in civil and criminal litigation at the trial and appellate levels.

7. In addition to my years of private practice, I worked from 1958 to 1960 as an Assistant U.S. Attorney, Northern District of Illinois, Criminal Division.

8. I am currently an adjunct professor at DePaul University, and have been a lecturer and instructor for the National College of Criminal Defense Lawyers since 1975.

9. Throughout my 25 years at the bar, I have specialized in criminal defense litigation, and have recently turned my attention to civil rights litigation and personal injury and medical malpractice litigation. The following constitute a few of the major cases I have worked on:

a) *People v. Black* (1966)—I represented one of two brothers who were charged with the robbery of the Rainbow Supermarket and the murder of a police officer.

b) *People v. Frederick Douglas Andrews* (1968)—I represented one of three Chicago westside community leaders charged with arson, in connection with fires which were set after the death of Martin Luther King, Jr.

c) *Inquest into the Deaths of Fred Hampton and Mark Clark* (1969)—I represented the families of Mark Clark and Fred Hampton, together with Deborah Johnson, in connection with investigations and hearings stemming from the raid on the Black Panthers' apartment on December 4, 1969, Chicago, Illinois.

d) *People v. Charles Edward Bey, et al.* (1970)—I successfully represented seven leaders of the Black P Stone Nation in connection with the slaying of police officer, James A. Alfano.

e) *United States v. Jeff Fort, et. al.* (1971)—I represented 21 leaders of the Black P Stone Nation in a federal trial resulting from alleged misuse of federal funds via a grant to the Woodlawn Organization.

f) I represented two young men who were charged with the armed robbery of a Brinks truck and its guard.

g) *People v. Edward Moran, et. al.* (1973)—I represented one of six men (De Mau Maus) charged with robbery and murder in Lake and Cook County, Illinois. My client, Edward Moran, during the course of the trial, was found dead in his cell in the special lock-up in the Lake County Jail in Waukegan, Illinois.

h) *United States v. Irvin Potter, et. al.* (1975) I represented nine men in a federal trial in connection with a policy and gambling operation.

i) *Iberia Hampton et. al. v. Edward V. Hanrahan, et. al.* (1976)—I was the chief counsel of the legal team representing the families of Fred Hampton and Mark Clark, along with other survivors of the Panther raid on December 4, 1969, in civil litigation wherein Edward V. Hanrahan (former State's Attorney of Cook County) and certain FBI agents and police officers of the City of Chicago were defendants therein. The trial commenced in January, 1976

and concluded in June, 1977. The case was appealed to the U. S. Court of Appeals for the Seventh Circuit and argued August 14, 1978, with the Opinion being rendered April 23, 1979, reversing as to certain defendants and remanded for a new trial.

j) *People v. David Muhammad, et. al.* (1978)—I represented David Muhammad, one of five young men charged with robbery, murder and conspiracy, known as the "I-57 Murders".

k) *United States v. James Blakey, et. al.* (1978)—I represented two Chicago police officers charged with extortion.

l) *United States v. Charles Wilson, et. al.*, (1981) I represented one of ten defendants who were charged with conspiracy and engaging in a continuing criminal enterprise, in violation of 21 U.S.C., Secs. 846 and 848, in connection with the alleged operation of a drug ring. The first trial resulted in a hung jury as to my client, Harry Cannon, and guilty verdict as to the other nine defendants. Upon retrial, my client was found guilty. The case is currently on appeal to the U. S. Court of Appeals for the Seventh Circuit.

10. In addition to the above, I am currently engaged in the following civil rights litigation:

a) *Rose Bluestein, etc., et. al.*, Civil -LV-80-399-HEC, before the United States District Court for the District of Nevada.

I represent the plaintiffs in their civil rights action against various members of the Las Vegas Metropolitan Police Department, the Sheriff of Clark County, Nevada, the City of Las Vegas, the County of Clark, Nevada, and various members of the Las Vegas Metropolitan Police Commission, as a result of the shooting death of plaintiffs' decedent.

b) *William Sanders v. Hall, et. al.*, Case No. 77 C 1818, before Judge J. Samuel Perry.

I represent the plaintiff in his civil rights action against various police officers, resulting from the defendants' shooting of the plaintiff.

11. I am familiar with fees customarily charged in this district by attorneys with my skill and experience. I am requesting that fees be awarded to me in this case at the rate of \$150.00 per hour as reasonable and appropriate, given my experience and the work I have done on this case. I customarily charge to and receive from most of my clients, \$200.00 per hour for my time and \$1,500.00 per diem for trial.

12. The forthcoming Statement of Attorneys Time accurately sets forth the number of hours of trial I spent working on this matter.

Further, affiant sayeth not.

/s/ JAMES MONTGOMERY
Affiant

SUBSCRIBED AND SWORN TO before me this 21st day of May, 1982.

/s/ WILLIAM E. HOLLAND
Notary Public

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, OF SEPTEMBER 3, 1982, REPORTED AT 547 FED. SUPP. 542 (APPENDIX B TO PETITION FOR WRIT OF CERTIORARI).

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, OF NOVEMBER 16, 1982, UNPUBLISHED:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ALFRED W. CHESNY, etc.,
Plaintiff,

v.

J. MAREK, et al.,
Defendants.

No. 79 C 4186

Memorandum Opinion and Order

Alfred W. Chesny ("Chesny"), individually and as administrator of the estate of his deceased son Steven, sued various defendants under 42 U.S.C. § 1983 ("Section 1983") and a number of state tort laws, charging the unlawful fatal shooting of Steven. After trial on the merits a jury found in part for Chesny and awarded a total of \$60,000 against defendants Marek, Wadycki and Rhode.

On September 3, 1982 this Court issued its memorandum opinion and order (the "Opinion," 547 F.Supp. 542) dealing with several post-trial motions:

1. It denied Chesny's motion for an additur to the jury verdict.

2. It denied defendants' motion for judgment n.o.v. and a related motion for attorneys' fees and costs.

3. It granted Chesny's motion for fees as a prevailing party under 42 U.S.C. § 1988 ("Section 1988"), but ruled that Chesny was entitled to fees and costs incurred only up to the time of defendants' offer of judgment under Fed. R. Civ. P. ("Rule") 68.

Both sides have accepted the first two rulings, so that the only remaining issue is the amount of the fee award to Chesny.

After Chesny's counsel had tendered a fees request revised downward to \$34,392.35 to conform to the principles stated in the Opinion, defendants' counsel Donald Peterson wrote the Court:

Please be advised that attorney Montgomery on behalf of the plaintiff and the undersigned on behalf of the defendants have reached an agreement on attorneys' fees in the sum of \$32,000 and no evidentiary hearing on the issue will be required.

In reply Chesny's counsel made plain that the portion of his revised request asking for a multiplier ("Plaintiff renews his request that this Court enhance this lodestar award by an appropriate multiplier") continued to apply to the agreed-upon \$32,000 figure:

Mr. Peterson's letter correctly sets forth our agreement. However, it should not be understood as a waiver of our pending claim and request that you enhance the lodestar amount of \$32,000 by an appropriate multiplier.

The sole purpose of our agreement was to avoid a testimonial hearing upon our Amended Claim for Attorney's Fees in the amount of \$34,392.35.

This Court has evaluated the request in light of all the factors identified in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976)

and often repeated since *Waters*. All Chesny's counsel has ever asserted as the basis for increasing the lodestar figure is a conclusory statement in his initial motion for fees and costs:

Plaintiff also asks that this Court enhance this base amount with a multiplier to reflect contingency, undisirability [sic], and the quality of work.

Lead counsel James Montgomery's supporting affidavit reflects that "any fees I would be entitled to were and are contingent upon the outcome of this cause, and 42 U.S.C. Sec. 1988."

Application of the *Waters* factors in the aggregate, as this Court is bound to do, negates the conclusion that Chesny's counsel has demonstrated the appropriateness of a multiplier. Though counsel certainly did a workmanlike job in representing his client, no new legal trails had to be (or were) blazed in the lawsuit. Fees and costs of some \$32,000 in light of a \$60,000 jury verdict are not out of line (that is, there is no need to enhance the fee award in light of the jury's evaluation of the case). And as indicated in the Opinion (547 F.Supp. at 548 n.5), the hourly rate for lead counsel's time (even when reduced to \$135-140, the precise figure depending on how the agreed-upon reduction in the claim is allocated among the several counsel and paralegals) is a reasonable one without multiplication.

For the foregoing reasons, in accordance with Section 1988, the sum of \$32,000 in costs including attorneys' fees is awarded to be taxed in favor of Chesny and against defendants.¹

/s/ MILTON I. SHADUR

Milton I. Shadur

United States District Judge

Date: November 16, 1982

¹ This award takes into account attorneys' time spent only until the offer of judgment under Rule 68, in accordance with the principles stated in the Opinion, 547 F.Supp. at 545-47.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT OF NOVEMBER 3, 1983, PUBLISHED AT 720 FED. 2ND 474 (APPENDIX A TO PETITION FOR WRIT OF CERTIORARI).

PETITION OF MAREK, ET AL., FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED 11/17/83:

No. 82-2927

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ALFRED W. CHESNY, Individually,
and as Administrator of the
Estate of STEVEN CHESNY,
Deceased,

Plaintiff-Appellant

vs.

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Defendants-Appellees

Petition for Rehearing
With Suggestion for Rehearing In Banc

Appeal from the
United States Dis-
trict Court for the
Northern District of
Illinois

No. 79 C 4186
Judge Shadur

DONALD G. PETERSON, of counsel
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No. 82-2927

IN THE
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ALFRED W. CHESNY, Individually,
and as Administrator of the Estate of
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Plaintiff-Appellant

vs.

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,
Defendants-Appellees

Appeal from the
United States
District Court for the
Northern District of
Illinois

—
No. 79 C 4186
Judge Shadur

**Petition for Rehearing,
With Suggestion for Rehearing In Banc**

NOW COME defendants-appellees, MAREK, WADYCKI and RHODE, and respectfully petition for a rehearing, with suggestion for rehearing *in banc*, of this Court's decision of November 3, 1983 which affirmed in part and reversed in part the District Court's ruling that under 42 USC § 1988 the plaintiff may only recover attorney's fees and costs accrued to the date of a valid Rule 68 offer of judgment. On November 3, 1983, this Court held that, despite the validity of a Rule 68 offer of judgment, the plaintiff's attorney shall receive attorney's fees for all services performed after the rejection of an offer of judgment which proved to be more favorable than his jury verdict.

This petition is based on the following point:

By blocking the application of Rule 68 to attorney's fee petitions under § 1988, while at the same time, refusing to consider the effect of the plaintiff's additional fees under his contingent fee contract, which was first revealed here in oral

argument, this Court has stepped beyond the philosophy underlying § 1988, which is to provide *reasonable* attorney's fees in light of all relevant factors. *Hensley v. Eckerhart*, — U.S. —, 103 S. Ct. 1933 (1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974); Senate Report, 94-1011, 10/1/76: Reprint US Code Cong. & Ad. News 5908, 1976. This Court has now created an avenue for plaintiff's attorneys in civil rights cases to be unreasonably and unjustly enriched through windfall fees. The emasculation of Rule 68 can devastate the judicial administration of this Circuit. This case is one of first impression, but is contrary to analogous rulings by the Tenth Circuit, Second Circuit, Ninth Circuit and Sixth Circuit.¹ Since the oral argument in this case on September 30, 1983, Judge John M. Canella, in direct conflict with this Court's opinion of November 3, 1983, filed his opinion on October 19, 1983 in the Southern District of New York, holding that Rule 68 is applicable to fees under § 1988. *Lyons v. Cunningham* (Oct. 19, 1983, 79 C-3953/JMC). The appellees respectfully suggest that this rehearing be conducted *in banc* to assure consistent application of the Federal Rules of Civil Procedure in the service of the efficient and effective judicial administration in this Circuit.

¹ See citation and discussion of these authorities at pages 5 to 9 of this Petition. (A-33 to A-36)

Argument

By Allowing an Attorney for a Civil Rights Plaintiff to Recover All "Reasonable" Attorney's Fees Under 42 USC § 1988 Plus a Percentage Under a Contingent Fee Contract With His Client, This Court Is Tolerating an Inappropriate and Unjust Enrichment to the Plaintiff's Attorney.

In the opinion of November 3, 1983, this Court has held that Rule 68 can never abrogate the right to attorney's fees by a civil rights plaintiff even though the offer of judgment is valid and the plaintiff subsequently obtains a judgment less than the offer. The Court has remanded the case to the District Court for a determination of "reasonable attorney's fees for services by the plaintiff's lawyer subsequent to the offer of judgment".

In its opinion, this Court further recognizes that the plaintiff and his attorney in this case had a contingent fee contract. On page 6 of the slip opinion, this Court states: "The plaintiff and his lawyers had a contingent fee arrangement in this case, though its terms are not in the record. . ." This fact was first brought to the attention of the appellees and this Court during oral argument. At no time prior to oral argument did the plaintiff or his attorney disclose the fact that a contingent fee contract was ever in existence. The significance of the contingent fee has never been briefed or argued.

The first documented reference by plaintiff's attorney to the contingent fee contract was submitted in his Bill of Costs And Attorney's Fees, filed with this Court on November 9, 1983, wherein the plaintiff states in paragraph 13: "That the nature of the petitioner's contractual relationship with his attorney is one of contingent fee." A review of the District Court docket and file would demonstrate that the plaintiff failed to file a copy of his contingent fee contract with his Affidavit of Compliance with General Rule 39. Rule 39 of the United

States District Court for the Northern District of Illinois requires plaintiff's attorney to file contemporaneously with his affidavit a signed copy of any written contingent fee agreement applicable to his compensation for representing the plaintiff. According to the Rule, if no copy of the contingent fee agreement is filed, the plaintiff's attorney is representing under oath that his compensation for services in the case is not on a contingent basis. The docket sheet contains no reference to the contingency fee contract, which is where it would be listed if the agreement is being held in the Court vault.

This Court bases its award of post offer of judgment fees on its view of the underlying philosophy of § 1988 which holds that the plaintiff's attorney is entitled to reasonable attorney's fees. Section 1988 provides that the District Court has the discretion of allowing reasonable attorney's fees to be paid as a part of the costs to the prevailing party in a civil rights case. The Congressional intent is to encourage attorneys representing civil rights litigants in meritorious actions by providing for the payment of attorney's fees to the prevailing party.

It is submitted, however, that Congress did not intend, nor have the Courts permitted, 42 USC § 1988 becoming a vehicle for excessive and exorbitant fees being paid to civil rights attorneys. Yet that is precisely the result which occurs in this instance when the unannounced and unknown contingent fee contract is coupled with this Court's permission for the plaintiff's petition for every dollar of "reasonable attorney's fees" he can substantiate through his time records.

Section 1988 establishes the standard that attorney's fees, first and last, must be "reasonable". Under the holding in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the policy has been established that a prevailing party should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust". *Id.* at 402.

While Courts may not have held contingent fee contracts to be an automatic death knell to a prevailing party's request

for attorney's fees under § 1988², the majority opinion among the Circuits demonstrates that contingency fee agreements are to be closely scrutinized for their effect on what constitutes a "reasonable" attorney's fee.³ *Rosquist v. SooLine R.R.* 692 F. 2d 1107 (7th Cir., 1982). In *Krause v. Rhodes*, 640 F. 2d 214 (6th Cir., 1981), the Sixth Circuit refused to permit the attorney's collection of his contingent fee in a civil rights case. *Krause v. Rhodes* was the litigation resulting from the death and injuries of several Kent State students by the Ohio National Guard in 1970. A former attorney for the plaintiffs sought to enforce his contingent fee contract after the \$675,000 settlement was accepted. In refusing to recognize the contingent fee agreement, the Sixth Circuit stated that "(w)hile the language of § 1988 does not expressly empower a district court to limit fees derived under a private agreement between prevailing attorney and his client, it is indicative of the extensive powers available to district judges in supervising attorney's fees awards in civil rights cases". *Id.* fn. 5 at 218-219.

This exercise of the Court's "extensive power", which also allows discretionary *denial* of attorney's fees under § 1988 in the face of a contingent fee agreement, is not without precedent. In *Brown v. Stackler*, 612 F. 2d 1057 (7th Cir., 1980), the attorney was denied all fees, including his fee under § 1988, wherein the plaintiff had sought to enjoin under 42 U.S.C. § 1983, the enforcement of Illinois statutes concerning prices advertised for eyeglasses. The Ninth Circuit in *Buxton v. Patel*, 595 F. 2d 1182 (9th Cir., 1979) found that the district court had not abused its discretion in denying attorney's fees under § 1988 where adequate compensation was available through the verdict. The Ninth circuit in *Buxon* cited with approval the Second Circuit's opinion in *Zarcone v. Perry*, 581 F. 2d 1039

² *Sargent v. Sharp*, 579 F. 2d 645 is in a minority among the Circuits in the automatic allowance of contingency attorney's fees.

³ See discussion of cases, *Infra*, Petition for Rehearing, pp. 6 to 9. (A-33 to A-36)

(2d Cir., 1978), which held that the *Newman v. Piggie Park*, *supra* standard should not be applied "woodenly without consideration of the underlying factors which generated it". *Zarcone, supra* at 1044. The *Buxton* Court has articulated the applicable standard for the instant case: that Courts should hesitate to shift attorney's fees under § 1988 where the plaintiff's case for damages, not injunctive relief, is quite sufficient to attract and compensate competent trial counsel. It is respectfully submitted that the Seventh Circuit should adopt this standard and apply it in this case.

Here, the plaintiff's attorney has belatedly confirmed that he has a contingent fee agreement with Mr. Chesny. Appellees presume that the contingent fee has been collected from the \$60,000 paid on judgment, which amount would be over and above the \$32,000 in pre-offer fees paid. The nature of contingent fee agreements recognize an element of a risk being taken by the attorney who is a party to the contract. Contingent fee contracts normally provide that a percentage, usually thirty to forty percent in this District, will be recovered by the attorney only in the event of a monetary verdict in favor of the attorney's client. In this instance, the plaintiff's lawyer is in all likelihood recovering on his "risk" through the contingent fee contract with Mr. Chesny without taking any risk at all. Refusal or failure to factor in the true and correct amount that the plaintiff's attorney has received under a contingent fee contract circumvents the Congressional intent behind § 1988 and negates the specific language of that section.

This contingent fee agreement with Mr. Chesny may have already netted the plaintiff's counsel an additional \$20,000 or \$24,000 or more. The civil rights award was \$5,000 plus \$3,000 punitive damages plus \$52,000 damages to the Estate. Plaintiff's attorney has already been paid by agreement \$32,000 in pre-offer attorney's fees and is now seeking an additional \$173,000 in post-offer fees plus \$38,000 for the appeal of the attorney's fee issue only. Thus, the plaintiff's attorney may by this Court's opinion recover approximately \$264,000 in fees on

a verdict of only \$60,000 which was paid virtually without a post-trial motion by defendant. The jury was asked by plaintiff's attorney for a \$3,500,000 verdict. The real substance of the post-trial proceedings has only involved attorney's fees.

In refusing to allow an attorney two chances for attorney's fees—once through contingency fee agreement and again through § 1988—the Court in *Cooper v. Singer*, 689 F. 2d 929, 931 (10th Cir., 1982) accurately summarized the problems:

The congressional policy behind § 1988 is set forth in Senate Report No. 94-1011 (Oct. 1, 1976), reprinted in (1976) U.S. Code Cong. & Ad. News 5908. The report states that civil rights laws depend heavily on private enforcement, and that the purpose of the law is to provide plaintiffs with an opportunity to enforce their rights undeterred by the possibility of large attorney's fees. The report contains a brief discussion of how to determine reasonable rates, and approves of standards that "are adequate to attract competent counsel, but which do not produce windfalls to attorneys". *Id.* at 5913. This caution against "windfalls" for attorneys shows that Congress was exclusively interested in making civil rights actions more attractive to prospective plaintiffs. Congress was not trying to get these cases into court by making civil rights actions more attractive to prospective plaintiffs. Congress was not trying to get these cases into court by making them lucrative to attorneys. Therefore, an award of attorney's fees which benefits a plaintiff's attorneys rather than a plaintiff does not further congressional policy. Such awards may, in the discretion of the court, be denied.

A grant of attorney's fees where a contingent fee agreement has been entered into without more may result in something of a windfall for attorneys. It relieves the attorney of part of the risk undertaken by the nature of the contingent fee contract, and preserves to the attorney the benefits of such a contract. It is apparent that if the case is lost the fee is also lost under either a contingent fee agreement or § 1988. If the case is won the attorney need not be content with the percentage for which he contracted as it remains on the floor.

A claim under § 1988 would provide the chance for a greater amount. Yet he would still be entitled to his percentage under the contingent fee contract, even if that percentage exceeded the reasonable value of his services. The attorneys here assert that they have the option to take the higher figure. This can not be done. an automatic allowance of attorney's fees despite contingent fee agreements would thus have the effect of insuring an attorney without necessarily improving the position of the prevailing party. The admonition of the Senate Report to avoid windfalls to attorneys indicates that this was not the congressional intent behind § 1988.

The appellees respectfully disagree with the relevance of this Court's apparent inference that it is unjust to require plaintiff's civil rights attorneys to "think very hard before rejecting (a Rule 68 offer of judgment) . . . knowing that the rejection could cost themselves or their client a lot if it turned out to be a mistake". Slip Op., p. 8. This apparent inference is not relevant to the policy of § 1988. It confuses guaranteeing a fee to a lawyer, good or bad, with the exoneration of his client's civil rights. The lawyer's rights, not the client's, are here at issue on this appeal. While reasonable attorney's fees serve public policy and should be allowed to attorneys for prevailing parties, the Federal Rules of Civil Procedure should also apply, including Rule 68, to all attorneys before this Court. Limiting Rule 68's applicability to costs for postage and photocopying creates a special class of plaintiffs' attorneys with special rights. It does nothing to vindicate their client's civil rights.

Because this Court has now ruled that defendants in a civil rights case can never protect themselves from payment of the prevailing plaintiff's attorney's fees by using the Federal Rules of Civil Procedure, this Court on rehearing should at minimum clarify the proper role the previously undisclosed contingent fee contract is to play on remand in the determination of the plaintiff's "reasonable" attorney's fees. It is submitted that this

Court should instruct the District Court to deduct any and all amounts previously received by the plaintiff's attorney from any amount determined to be the reasonable attorney's fees. The mandatory election by plaintiff's attorney of contingent fees or § 1988 fees would be the only alternative way of preventing unjust enrichment. The plaintiff's attorney has made that election by entering into a contingent fee contract and presumably collecting on it.

Conclusion

Rule 68 can greatly benefit the administration of justice by the trial courts in this Circuit. Abolition of Rule 68 in civil rights cases will have the opposite effect for the disposition of civil rights cases in the trial court. Due to the unique question of the interplay between § 1988 which provides for the payment of reasonable attorney's fees and the contingent fee contract which is now acknowledged to exist in this case, the defendants-appellees are requesting that the Seventh Circuit Court of Appeals review this matter *in banc*. This question is one of first impression in this Circuit, as is the question of the Rule 68 applicability to § 1988. The appellees respectfully suggest that these issues are of exceptional importance to the administration of justice with wide ranging impact in the District Court.

For the foregoing reasons, defendants-appellees request an opportunity for a rehearing on this point. Due to the fundamental nature of the question presented and the effect on the judicial administration of this Circuit Court, it is suggested that the rehearing be before the entire Court sitting *in banc*.

DATED: November 17, 1983.

Respectfully submitted:

SCHAFFENEGGER, WATSON & PETERSON, LTD.

by: /s/

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ANSWER OF CHESNY TO THE PETITION FOR RE- HEARING WITH SUGGESTION FOR REHEARING IN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED 12/16/83:

No. 82-2927

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ALFRED W. CHESNY, individually,
and as Administrator of the Estate
of Steven Chesny, Deceased
Plaintiff-Appellant

v.

J. MAREK, et al.
Defendants-Appellees

Appeal from the
United States District
Court for the
Northern District
of Illinois,
79 C 4186

The Honorable
Milton Shadur,
Presiding Judge

Answer to the Petition for Rehearing
With Suggestion for Rehearing In Banc

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IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ALFRED W. CHESNY, individually, and as ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNY, DECEASED	}	No. 82-2927
<i>Plaintiff-Appellant</i>		
v.		
J. MAREK, etal.	}	
<i>Defendants-Appellees</i>		

**Answer to the Petition for Rehearing
With Suggestion for Rehearing In Banc**

Now comes plaintiff-appellant, Alfred W. Chesny, and respectfully answers the petition for a rehearing, which suggested a rehearing in banc, of this Court's decision of November 3, 1983 which affirmed in part and reversed in part the District Court's ruling regarding the effect of a Rule 68 offer of judgment on post-offer attorneys' fees.

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Introduction

This Honorable Court, in arriving at its decision regarding the applicability of Rule 68 to post-offer attorneys' fees under Sec. 1988, gave full consideration to all factors that were properly before the Court and germane to both the legal and factual questions involved. Appellant's fee arrangement is not material to that decision.

Appellees are not entitled to study and reargue their case again on Petition for Rehearing simply because they failed to raise a point of argument earlier. *Anderson v. Knox*, 300 F.2d (9th Cir. 1962). The purpose of the petition is to direct the Court's attention to matters of "material" fact or law, which it overlooked in deciding a case and which, had it been given consideration, would have brought about a different result. *Board v. Brown & Root, Inc.*, 206 F.2d 73 (8th Cir. 1953).

Appellees as well as the District Court were apprised of the contingent nature of appellant's contractual relationship with his counsel prior to the entry of the Order upon which this appeal was taken. By making erroneous assertions and/or assumptions of fact, the appellees have attempted to induce this court to reconsider its Opinion. Appellees have asked this Court to render an advisory opinion in a matter that upon remand would, in any event, be decided by the District Court pursuant to Sec. 1988.

This case is not factually within the cases cited by appellees inasmuch as appellant's counsel would hardly be unjustly enriched under this fee arrangement. If fact, counsel is worse off under his contingent fee contract. This Court has created no new avenues for the enrichment of plaintiff's attorneys, since the mechanisms and safeguards protecting parties from exorbitant attorneys' fees are just as viable now as they were prior to the decision rendered in this appeal.

Argument

I

Appellees Have Failed to State a Meritorious Basis to Support Their Suggestion for Rehearing In Banc

Under the Rules of the U. S. Court of Appeals for the Seventh Circuit, Rule 16(b), a suggestion for rehearing in banc is proper when the petition states in a concise sentence reasons why the appeal is of exceptional importance, or with what decision of the United States Supreme Court, this Court or another Court of Appeals, the panel decision is claimed to be in conflict.

Appellees attempt to bestow exceptional importance status on the "reasonableness" of the attorney's fees question, but fall woefully short as no determination has yet been made by the District Court regarding the "reasonableness" of fee requests in this case. Moreover, the facts of this case do not support their argument.

The key issue on appeal of the inapplicability of Rule 68 to Sec. 1988 fees is of exceptional importance, but is wholly independent of questions of reasonable Sec. 1988 fee requests. The Rule 68 issue goes to whether appellant is entitled to make a fee request. To bootstrap the two issues together in order to have the key issue reheard in banc is inappropriate.

No cases cited by appellees in their suggestion have held contrary to this court's decision, nor do those cases suggest that the potential for unreasonable attorney's fee requests in different cases is a factor to take into account in determining whether a fee request can be made for post Rule 68 offer fees.

II

The Issue of the Reasonableness of the Appellant's Attorney's Fees Under 42 U.S.C., Sec. 1988 Is Not Properly Before This Court.

In its opinion dated November 3, 1983, this Court held that Rule 68 cannot be applied to abrogate substantive rights of recovery to the plaintiff allowed under Sec. 1988. As the appellees pointed out in their petition, the Court remanded this cause to the District Court for a determination of a "reasonable" attorney's fee for services performed on behalf of Mr. Chesny after the offer of judgment.

The appellees now attempt to induce this court to hear a premature argument as to what constitutes a reasonable fee in this case, implying that (1) either the question has been decided in the District Court thereby impairing their rights and remedies in that forum, (2) the District Court is ill-equipped to perform the duties bestowed upon it by Sec. 1988 and the applicable case law, or (3) appellees have not waived their rights to have their argument reviewed.

Appellees attempt to lend credence to their implication of prejudice and non-waiver by erroneously suggesting to this Court that the existence of a contingent fee arrangement was first brought to their attention during oral argument. The record shows that, via affidavit to the District Court on May 21, 1982, Mr. Chesny's counsel, James D. Montgomery, apprised the Court as to one of the factors impacting on a reasonable fee, that "...any fees I would be entitled to were and are contingent upon the outcome of this cause, and 42 U.S.C., Sec. 1988."

The Affidavit was filed with the District Court and served upon the appellees' counsel. If, perchance, this reference to a contingent fee relationship escaped the attention of appellees, they could have seen the very same reference made on page 3 of Judge Shadur's Memorandum Opinion and Order of

November 16, 1983. Had it escaped appellee's attention once more, they might have seen it when they included it in their own brief on appeal. (See Appellee's Brief, Appendix B, p.3).

While the reference made in the record does not disclose the terms of the agreement, appellees had no objection to its existence. Indeed, they settled, by agreement with Mr. Chesny on a figure they believed to be a reasonable pre-offer fee without inquiring into the terms of Mr. Chesny's fee agreement.

As appellees correctly state, Mr. Chesny's counsel inadvertently failed to attach the contingent fee agreement (See Exhibit #1) to his Rule 39 Affidavit. This oversight can and will be corrected simply by filing an amended Rule 39 Affidavit upon remand. Heretofore, none of the parties have been prejudiced as a result of the defective Rule 39 Affidavit, and appellees have not asserted that they relied upon it to any extent.

As to the additional attorneys' fees to be granted upon remand, it is the obligation of the District Court to determine, based upon the prevailing laws and factors found to exist in each case, whether or not a fee request is reasonable. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

Appellees would have this Court render an advisory opinion establishing general guidelines as to the reasonableness of a fee, and then remand to the District Court for an Order as to a reasonable fee from which appellees might then appeal. As this Court will note (*infra*, pp. 7-9), the factual basis upon which appellees aver windfall fees and zero risk-taking is absent here. If the Court were to grant this petition and rule in appellee's favor, the decision would have no impact on the parties to this lawsuit. No ends of justice would be served by this court making a ruling regarding the impact of its November 3, 1983 decision on hypothetical fee arrangements.

III

Even if This Court Were the Proper Forum to Determine Reasonableness, Appellees' Assertion That Appellant's Attorney Shall Receive Windfall Fees Under Sec. 1988 Is Without Merit.

Under the applicable standard, a prevailing plaintiff in civil rights litigation may "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, *supra*.

Appellees have assumed that appellant's attorney contracted to receive a percentage of the verdict award at trial plus *ALL* fees recoverable by appellant under Sec. 1988. Based thereon, appellees assumed further that appellant's attorneys would receive \$264,000 of requested fees while appellant would receive only \$36,000-\$40,000 resulting from this litigation. Appellees then concluded that only appellant's attorney's rights and interests were at stake in this matter, and that counsel was taking no risks. Thus, appellees concluded sufficient special circumstances existed to deny attorney's fees in this case. While appellees have made an attractive argument, it must fail as premised upon speculation rather than fact.

Appellant, as a prevailing party in this case, is entitled to attorney's fees based upon the reasonable value of his attorney's services under Sec. 1988. This holds true regardless of whether appellant agrees to pay those fees to his attorney. *Howard v. Phelps*, 443 F. Supp. 374 (Ed. La. 1978). The Court may supervise fees in a Sec. 1988 case to protect parties from overreaching just as in any case where fees are contingent upon victory at trial.

In this case, appellant contracted with his attorney that his attorney would be entitled to a percentage of all monies recovered for appellant whether through verdict or Sec. 1988.

There was a verdict of \$60,000 at trial and thus far a \$32,000 Sec. 1988 award of attorney's fees. Appellant's counsel is entitled to a percentage of the \$92,000 under its contract rather than \$32,000 plus a percentage of the \$60,000 verdict. (See Exhibits 1 and 2).

Based upon appellant's contract with his attorney and his requests for attorney's fees to date, his attorney's maximum recovery for fees in this case would be \$121,950 while the full value of his services would equal \$211,000. Appellant's figures were computed as follows:

Fee Recoverable Out of Verdict	\$ 27,000 (45% of 60,000)
Sec. 1988 Fees Pre-Offer	14,400 (45% of 32,000)
Post-Offer Sec. 1988 Fees	63,450 (45% of 141,000)
Sec. 1988 Fees on Appeal	17,100 (45% of 38,000)
 Total	 \$121,950 (45% of 271,000)

Appellant's attorney has no option to take all fees recovered by appellant under Sec. 1988 and stands by the terms of his contract. Considerations of windfall as cited by appellees do not exist. Contrary to appellees' contention, appellant's counsel's position is worse as a result of the contingent fee arrangement than had he contracted for all fees assessable under Sec. 1988. Those principles of *Cooper v. Singer*, 689 F.2d 929 (10th Cir.1982) cited by appellees are, therefore, inapplicable to this case.¹ Indeed, . . . "if plaintiff and his or her attorney have agreed on a figure for fees or a percentage, this should constitute the maximum allowable fee . . . Thus . . . to use the existence of the contingent contract as a 'special circumstance' to deny the award of fees" is improper. *Cooper* at 932.

¹ *Cooper* disavowed the option of the attorney to take a minimum under the contingent fee arrangement while reserving the right to take Sec. 1988 fees, if the latter proved greater.

Conclusion

This Court's decision regarding the applicability of Rule 68 to Sec. 1988 is independent of reasonable fee considerations. The District Court has made no rulings on the reasonableness of any fee request of the appellant and any requests to be made in that Court are subject to the scrutiny of appellees. The "unique-question" appellees herein raise is based solely upon the facts of the cases they cited rather than the facts of this case. Indeed, appellees have raised no valid questions for rehearing in their petition and appellant submits that the petition is dilatory in nature, and serves only to burden the administration of justice and enhance appellant's claim for fees.

For the foregoing reasons, appellant respectfully requests that the petition for rehearing with suggestion for rehearing in banc be denied.

Respectfully Submitted

Attorney for Appellant

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Suite 1521

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ALFRED W. CHESNY, individually,
and as Administrator of the Estate
of Steven Chesny, Deceased
Plaintiff-Appellant

v.

J. MAREK, et al.
Defendants-Appellees

No. 82-2927

**Affidavit in Support of Answer to Petition
For Rehearing**

I, James D. Montgomery, being first duly sworn, depose
and say as follows:

1. That I was retained to represent the plaintiff-appellant,
Alfred W. Chesny, in this cause of action.
2. That Exhibit 1 is a true and correct copy of my
attorney's fee agreement with Alfred W. Chesny.
3. That Exhibit 2 is a true and correct copy of the
Addendum to Settlement Statement showing the distribution of
attorney's fees recovered to date, pursuant to 42 U.S.C., Sec.
1988.

FURTHER, affiant sayeth not.

/s/ JAMES D. MONTGOMERY

SUBSCRIBED AND SWORN TO before me this 14th
day of December, 1983.

(illegible)
Notary Public

**EXHIBIT NO. 1 TO ANSWER FOR PETITION FOR
REHEARING IN UNITED STATES COURT OF AP-
PEALS FOR THE SEVENTH CIRCUIT**

August 23, 1979,
Chicago, Illinois

Agreement

I, ALFRED W. CHESNY, hereby retain and employ
James D. Montgomery and Montgomery and Holland, at-
torneys, to prosecute and/or settle all claims for damages
against the Village of Berkeley, Illinois, etal., on account of the
wrongful death of my son, Steven Chesny, arising out of a
shooting incident which occurred at 1416 Hillside Avenue,
Apartment 4A, Berkeley, Illinois, on December 19, 1978.

I agree to pay as compensation for services rendered a sum
of money equal to 45% of any amount realized from said claims
either by settlement or judgment, less \$2,000 which has been
previously paid by me to said attorneys.

I further agree to pay all costs and expenses incident to the
prosecution and/or settlement of this suit.

It is further understood and agreed that no settlement will
be made without my consent.

/s/ ALFRED W. CHESNY
Alfred W. Chesny

**EXHIBIT NO. 2 TO ANSWER TO PETITION FOR
REHEARING IN THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

Addendum to Settlement Statement

THIS ADDENDUM is attached to and made a part of a certain Settlement Statement dated September 27, 1982, executed by Alfred W. Chesny as Administrator of the Estate of Steven Chesny, deceased, relative to the distribution of attorneys' fees as awarded by the court pursuant to Memorandum Opinion and Order dated November 16, 1982, signed by the Honorable Milton I. Shadur, Judge of the U.S. District Court, in the matter entitled: Alfred W. Chesny, etc. v. J. Marek, et al., Case No. 79 C 4186.

ADDITIONAL SETTLEMENT	\$32,000.00
James D. Montgomery	
(45% of 32,000)	\$14,400.00
Alfred W. Chesny, Adminis-	
trator of the Estate of Steven	
Chesny, deceased	
(55% of 32,000)	<u>17,600.00</u>
Total (as above)	<u><u>32,000.00</u></u>

I, ALFRED W. CHESNY, hereby acknowledge receipt of a check in the amount of \$17,600, dated December 6, 1982, payable to me as Administrator of the Estate of Steven Chesny, deceased, based upon the distribution of proceeds from settlement check in the amount of \$32,000, enumerated above.

/s/ ALFRED W. CHESNY
Alfred W. Chesny, individually
and as Administrator of the
Estate of Steven Chesny,
Dec'd.

DATED: December 1, 1982,
Chicago, Illinois.

**ORDER OF THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT OF JANUARY 20, 1984,
DENYING THE PETITION FOR REHEARING (APPEN-
DIX C TO PETITION FOR WRIT OF CERTIORARI).**

(1)

Office - Supreme Court, U.S.
FILED
JUN 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1437

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE

JIM SMITH
ATTORNEY GENERAL

MITCHELL D. FRANKS*
CHIEF TRIAL COUNSEL

LINDA K. HUBER
BRUCE A. MINNICK
ASSISTANT ATTORNEYS GENERAL

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The Capitol, Suite 1501
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Counsel for Amicus Curiae

*Counsel of Record

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When a plaintiff has rejected a valid offer of judgment under Rule 68 of the Federal Rules of Civil Procedure and has recovered less than the offered amount at trial, the plaintiff is not entitled to recover his attorney's fees under 42 U.S.C. §1988 for legal work performed after the offer of judgment.

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Chesny, Waters and Bitsouni -
Decisions considering the
impact of Rule 68 upon the
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STATUTES INVOLVED

United States Code, Title 42, §1988 as amended.
Proceedings in vindication of civil rights;
attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the

Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of §1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

United States Code, Title 28, Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice

that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

QUESTION PRESENTED

Whether a plaintiff is entitled to recover his attorney's fees under Title 42 U.S.C. § 1988 for work performed after a valid offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, when plaintiff has rejected the offer and at trial has recovered less than the offered amount.

STATEMENT OF INTEREST

State of Florida, ex rel., Jim Smith, Attorney General, pursuant to Rule 36, Rules of the Supreme Court of the United States, files its Amicus Curiae Brief in support of arguments presented by Petitioners Jeffrey Marek, Thomas Wadycki, and Lawrence Rhode.

As a frequent defendant in civil rights litigation, the State has an interest in having available a fair and reasonable method for resolving civil rights litigation through settlement. If the decision of the court of appeals is not reversed, the State's ability to resolve civil rights litigation through settlement will be severely impaired.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE
STATE OF FLORIDA EX REL. JIM SMITH,
ATTORNEY GENERAL

OPINIONS BELOW

The opinion of the court of appeals is reported at 720 F.2d 474. The opinion of the district court is reported at 547 F. Supp. 542.

SUMMARY OF ARGUMENT

Rule 68, Fed.R.Civ.P., encourages settlement of lawsuits by shifting the burden of costs when a plaintiff has rejected an offer of judgment, but at trial recovers less than offered. 42 U.S.C. §1988 permits attorney's fees to be awarded as part of costs to prevailing parties in civil rights litigation. Due to §1988's designation of attorney's fees as costs, in a civil rights action, an offer of judgment should include an offer to pay attorney's fees accrued. If a plaintiff rejects the offer of judgment, and then recovers less than the offered amount, defendants should be entitled to the benefit of Rule 68 and plaintiff should not be allowed to recover attorney's fees for the unnecessary post-offer legal work.

The decision of the court of appeals permitting plaintiff to recover his full attorney's fees in this situation is erroneous, unsupported by the language or policies of either Rule 68 or §1988, is contrary to the decisions of other courts considering the question, and should be reversed.

ARGUMENT

WHEN A PLAINTIFF HAS REJECTED A VALID OFFER OF JUDGMENT UNDER RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND HAS RECOVERED LESS THAN THE OFFERED AMOUNT AT TRIAL, THE PLAINTIFF IS NOT ENTITLED TO RECOVER HIS ATTORNEY'S FEES UNDER 42 U.S.C. §1988 FOR LEGAL WORK PERFORMED AFTER THE OFFER OF JUDGMENT.

INTRODUCTION

Plaintiff seeks his attorney's fees under 42 U.S.C. §1988 for work performed after rejecting a valid Rule 68 offer of judgment which included attorney's fees, when less than the total amount offered was recovered at trial (hereinafter the "less prevailing plaintiff"). Based upon Rule 68 Fed.R.Civ.P., defendant challenges plaintiff's entitlement to fees under 42 U.S.C. §1988.

In 42 U.S.C. §1988, Congress empowered the courts to allow a prevailing party in civil rights litigation "a reasonable attorney's fee as part of the costs." Under Rule 68, Fed. R.Civ.P., after rejection of an offer of judgment, if "the judgment finally obtained by

the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer" (emphasis added). Consequently, defendant should not be required to pay plaintiff's attorney's fees incurred after the offer of judgment.¹

CHESNY, WATERS, AND BITSOUNI - DECISIONS
CONSIDERING THE IMPACT OF RULE 68 UPON
THE ATTORNEY'S FEE PROVISIONS OF THE
CIVIL RIGHTS ACT.

While the question of attorney's fees as costs has arisen in a number of other contexts, the instant appeal involves the first decision to pass upon the specific question of Rule 68's impact upon the attorney's fee provision of §1988. Here the court of appeals

¹ The issue is whether plaintiff's attorney's fees are barred; it is not whether plaintiff may be required to pay defendant's fees. Fee questions arise under Rule 68 only when a statute authorizes the recovery of fees as costs. Cf., Pigeaud v. McLaren, 699 F.2d 401, 404 (7th Cir. 1983) (Rule 68 costs do not include attorney's fees in the absence of statutory entitlement thereto.) To be entitled to recover fees under §1988, one must be a prevailing party.

(footnote continued on the next page)

reversed the district court's determination that Rule 68 barred the recovery of §1988 attorney's fees for post-offer of judgment legal work in the less prevailing plaintiff situation, and held that plaintiff would be allowed to recover attorney's fees for work performed after the offer of judgment even though plaintiff recovered less than the offered amount at trial. Chesny, 720 F.2d at 478-480.

The court of appeals grounded its decision upon a belief that barring recovery of fees for post-offer work would have a deterrent impact upon civil rights litigation, and would

(footnote continued from preceding page)

As the district court noted, Rule 68 operates only when a plaintiff has made some recovery, so a defendant seeking the benefits of Rule 68 would never be a prevailing party under §1988 entitled to the recovery of any fees. Chesny, 547 F.Supp. at 547. Cf., Delta Air Lines, Inc. v. August, 450 U.S. 346, 67 L.Ed. 2d 287, 101 S.Ct. 1146 (1981) (Rule 68, Fed. R.Civ.P., does not apply when judgment is entered against the plaintiff and in favor of the defendant).

cut "across the grain of section 1988." Id. at 479. Upon analysis, the court's reasoning fails, however. Nothing contained within §1988 or its legislative history requires the payment of attorney's fees for post-offer of judgment legal work in a less prevailing plaintiff situation.

Section 1988 was designed to insure civil rights litigants access to competent counsel in an effort to encourage private enforcement of a public policy against illegal discrimination. See, e.g., Blum v. Stenson, __U.S.__, 79 L.Ed.2d 891, 900, 104 S.Ct. __ (1984); and Hensley v. Eckerhart, __U.S.__, 76 L.Ed.2d 40, 48, 103 S.Ct. 1933, 1937 (1983). By its terms, however, §1988 limits the recovery of legal fees to prevailing parties. This limitation on fee recovery underscores Congress's intent to encourage the vindication of civil rights abuses by rewarding only successful litigants. Regardless of any mitigating factors, there is no authorization for the recovery of

any fees by an unsuccessful plaintiff. As the Court stated in Hensley:

Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

76 L.Ed.2d 52.

A plaintiff who refuses a reasonable offer of judgment, and then at trial recovers less than offered, while still a prevailing party, is unquestionably less of a prevailing party than he would have been if he had accepted the offer. The legal efforts expended between the offer of judgment and the conclusion of the trial netted the plaintiff nothing. For that portion of the case (including trial efforts) the plaintiff may be said to be a non-prevailing party. Although §1988 does mandate that there should be recovery of some legal fees in this situation, it is certainly in accord with the goals and policies underlying the statute to deny fees for post-offer

of judgment work in situations where such unnecessary work produces nothing. Accordingly, the court of appeal's conclusion that a bar on the recovery of fees would cut "across the grain of section 1988" is without foundation.²

The court of appeal's belief that a bar on the recovery of fees for useless post-offer of judgment work in these situations will have a deterrent impact upon civil rights litigation is also without support. As a practical matter, it is extremely unlikely that an attorney would be deterred from bringing a civil rights action because of the possibility that he might receive a reasonable offer of settlement, reject it,

² As the Court stated in Blum v. Stenson, U.S. ___, 79 L.Ed.2d 891, 900, 104 S.Ct. ___, (1984): "The legislative history explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys'" (citation omitted).

(footnote continued on next page)

and then at trial recover less than offered. Rather than concern over the risk of losing fees, the attorney should be glad to be able to vindicate his client's rights without the necessity of going to trial. Furthermore, one has only to look at the practical applications of permitting the recovery of fees in this situation to see that such a decision is fraught with peril.

Any attorney, in a Chesny position faced with an offer of settlement, knows and will be thinking, consciously or unconsciously, that regardless of the reasonableness of the settlement offer, all he need do is win some-

(footnote continued from preceding page)

In the same vein, in Hensley v. Eckerhart, U.S. ___, 76 L.Ed.2d 40, 59, 103 S.Ct. 1933, 1947 (1983) (Brennan, J., dissenting), it is stated: "If attorneys representing civil rights plaintiffs do not expect to receive full compensation for their efforts when they are successful, or if they feel they can 'lard' winning cases with additional work solely to augment their fees, the balance struck by §1988 goes awry."

thing at trial; even though the recovery is less than the offer, he still will be entitled to fees for all work performed on the prevailing issues, regardless of the benefit to his client.

The facts of the case sub judice are illustrative. Plaintiff's counsel's work prior to the offer of judgment amounted to only thirty-two thousand dollars (\$32,000.00); by the conclusion of trial, counsel's fees had escalated to more than one hundred seventy thousand dollars (\$170,000.00). Chesny, 720 F.2d at 478 and 480. For the unnecessary legal work performed between the offer of judgment and the jury's verdict, plaintiff requested over one hundred forth thousand dollars (\$140,000.00); meantime, the jury's verdict on the damage claim was for sixty thousand dollars (\$60,000.00). Id. at 476.

It is very easy to imagine even the best intentioned attorney in a Chesny settlement posture being flooded with "reasons" why his

client will benefit from protracted litigation rather than settlement. In this situation not only is settlement discouraged, unnecessary litigation is invited. Also, the earlier and more reasonable offers are the most discouraged. A reasonable offer would encourage plaintiff's attorney in a belief he can succeed at trial; while the earlier the offer, the more the attorney stands to "lose" by accepting the offer.

However cynical this analysis may seem, it is supported by the fact of extremely large civil rights attorney fee awards. As a practical matter, it may be expecting too much to believe that an attorney would not be affected by the prospect of receiving fees of \$170,000.00 rather than \$32,000.00

Although the stated objective of the court of appeals was to further the goals of §1988, the opposite has occurred. Not only are the results obtained under Chesny unrelated

to any legislative policy of §1988, but a potential conflict of interest is created between the attorney and his client which could undermine the entire attorney-client relationship. The decision of the court of appeals should be reversed and the Court should hold that a less prevailing plaintiff may not recover fees for post-offer of judgment legal work.

The district court, in its well-reasoned opinion, set forth in summary fashion the grounds for its decision that a less prevailing plaintiff should be barred from recovering attorney's fees for post-offer legal work. Chesny, 547 F.Supp. at 547. First, the district court stated that the decision would be "consistent with the literal language of Rule 68 and Section 1988," and noted agreement with the decision in Waters v. Heublein, 485 F.Supp. 110 (N.D. Cal. 1979). Second, the court recognized that the bar on post-offer fees would "stimulate realistic settlement

efforts before trial." Finally, even though the court realized counsel for plaintiff would be facing the risk of losing statutory fees for post-offer work, the court refused to "adopt the wrong rule because the right one may have a harsh application in a few cases." Ibid.

The decision of Waters v. Heublein, Inc., 485 F.Supp. 110 (N.D. Calif. 1979), relied upon by the district court, also involved the question of whether attorney's fees should be barred under Rule 68. There, however, the question arose under the fees provision of Title VII, 42 U.S.C. §2000e-5(k).³ Just as

³ The fees provision of Title VII, 42 U.S.C. §2000e-5(k), contains language almost identical to that found in §1988, and the Court has recognized that §§1988 and 2000e-5(k) are closely related and intended by the legislature to be treated the same generally. Hensley v. Eckerhart, U.S. ___, 76 L.Ed.2d 40, 50, 103 S.Ct. 1933, 1939, n. 7 (1983); and Roadway Express, Inc., v. Piper, 447 U.S. 752, 758, 65 L.Ed.2d 488, 496, 102 S.Ct. 2455, 2460, n. 5 (1980).

the district court here did, the court in Waters determined that a less prevailing plaintiff should be barred from recovering post-offer of judgment fees.

In its analysis of the question, the Waters court reasoned that barring the recovery of fees for post-offer of judgment work furthered the policy behind Rule 68 without unduly interfering with the policy of awarding fees to successful civil rights plaintiffs. Specifically, the court stated:

Since the pre-offer efforts of the attorney reached a result more favorable to the client than the verdict, there seems little reason to reward that attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits. Thus, this application of the Rule should work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation.

Id. at 114-115.

Similarly, in Bitsouni v. Sheraton Hartford Corp., Civil No. H 77-337 (D. Conn. Nov. 28, 1983), (App. 1), the court refused

to allow a less prevailing plaintiff any §2000e-5(k) attorney's fees for post-offer legal work. Although the court was very concerned over the possibility that a plaintiff could be held liable for a defendant's legal fees, it had no hesitancy in barring the recovery of plaintiff's fees. Id. at 2355. (App. p. 18).

The court of appeals stands alone in its belief that §1988 fees are not costs under Rule 68, and that a less prevailing plaintiff should be able to recover post-offer fees. The other courts considering the question have accorded the language of Rule 68 and §1988 its plain and proper meaning, and have determined that §1988 fees are included within Rule 68's costs, and that the recovery of fees in a less prevailing plaintiff situation is barred by Rule 68.

SUPREME COURT DECISIONS CONSIDERING
THE QUESTION OF ATTORNEY'S FEES AS
COSTS IN RELATED CONTEXTS

On two occasions, with differing results, the Court has considered the question of attorney's fees as costs.⁴ In Roadway Express, Inc. v. Piper, 447 U.S. 752, 65 L.Ed.2d 488, 100 S.Ct. 2455 (1980), the Court held that attorney's fees authorized by the civil rights statutes, 42 U.S.C. §§1988 and 2000e-5(k), were not costs under 28 U.S.C. §1927. In Hutto v. Finney, 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978), the Court held that §1988 attorneys fees were costs and as such were assessable against the States even without an express Congressional abrogation of the States' Eleventh Amendment

⁴ In White v. New Hampshire Department of Employment Security, 455 U.S. 445, 454, n.17, 71 L.Ed.2d 325, 333, 102 S.Ct. 1162, 1168 (1982), the Court expressly declined to decide whether attorney fee requests are motions for costs under Rule 54(d) and 58, Fed.R.Civ.P.

immunity. The issue in Piper is readily distinguishable from the instant question; it is the Court's decision in Hutto that bears upon the issue presently before the Court.

In Piper, the question of attorney's fees as costs was presented to the Court in the context of whether the civil rights attorney's fee provisions, 42 U.S.C. §§1988 and 2000e-5(k), read together with 28 U.S.C. §1927⁵ authorized a court to assess defendant's counsel's fees against plaintiff's counsel. Piper, 447 U.S. at 756. The Court concluded fees could not be assessed against plaintiff's counsel under these circumstances.

⁵ Title 28 U.S.C. §1927 provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

In deciding against the inclusion of attorney's fees as part of §1927's costs, the Court thoroughly reviewed the varying purposes underlying each of the provisions, and stated:

The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy. Unlike §1927, both §1988 and §2000e-5(k) restrict recovery to prevailing parties. In addition, those provisions have been construed to treat plaintiffs and defendants somewhat differently. . . .

But §1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes.

447 U.S. at 762. Therefore, since §1927 was punitive in nature and directed at the attorney rather than the party, while the civil rights provisions were keyed entirely to the parties and the merits of the action, the Court determined §§1988 and 2000e-5(k) attorney's fees could not be costs under §1927. But as the above analysis suggests,

it was the incompatibility between the statutes that required the result, not any magic in the words "fees" or "costs".

For the very reasons the Court decided civil rights attorney's fees were not costs under §1927, the Court should find they are costs under Rule 68. Rule 68, unlike §1927, is tied to the merits of the action; as with §1988, its application is limited to prevailing parties. Just as §1988 discourages unnecessary litigation by not allowing fee awards to unsuccessful plaintiffs, so Rule 68 furthers the goal of judicial economy by shifting the burden of costs to the party who refuses good faith settlement offers. The incompatibility that the Court was confronted with in Piper is not present here. A determination that Rule 68 costs includes §1988 attorney's fees furthers the goals of both the Rule and the statute.

In Hutto v. Finney, 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978), where the

question of attorney's fees as costs came up in the context of the Eleventh Amendment to the Constitution and a state's right to be free from suit in federal court absent waiver or abrogation of its sovereign immunity, the Court stated, not once, but repeatedly that attorney's fees are costs.

First the Court quoted with approval from §1988's legislative history:

"[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

437 U.S. at 694, quoting from S.Rep.No. 94-1011, p.5 (1976) (emphasis added).

The Court goes on to state:

The Act imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court.

Id. at 695.

With barely a pause, the Court next stated:

A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant and in imposing costs upon it' when an award is called for.

Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs (citation omitted) (emphasis added).

Id. at 696-697.

Finally, the Court stated:

It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity.

Id. at 698.

Although, when the question of attorney's fees as costs comes up, Hutto is usually dis-

tinguished because it arose in the context of sovereign immunity and is somehow not conclusive, by its language the decision certainly appears to be conclusive.⁶ Furthermore the question could not have arisen under more serious circumstances. The states' immunity from suit in federal court is constitutionally protected; a decision in this context should carry more weight, not less.

There is an expectation that within the confines of the judicial system a certain

⁶ Lower courts that have considered the question are in accord in holding that attorney's fees are costs. See, Fulps v. City of Springfield, Tennessee, 715 F.2d 1088 (6th Cir. 1983) (holding that the language "plus costs accrued to date" in an offer of judgment in a civil rights action included an offer to pay attorney's fees); Greenwood v. Stevenson, 88 F.R.D. 225 (D.Rhode Island 1980) (where the court agreed with the decision in Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Calif. 1979) but felt bound by the First Circuit decision in White v. New Hampshire Department of Employment Security, F2d 697 (1st Cir. 1980), since reversed at 455 U.S. 445, 71 L.Ed.2d 325, 102 S.Ct. 1162 (1982); and Scheriff v. Beck, 452 F.Supp. 1254 (S. Colo. 1978) (in a civil rights action, an offer to pay costs under Rule 68 must include attorney's fees.)

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equity will inhere. There is a fundamental unfairness in telling a state that a plaintiff may recover his attorney's fees as costs, and that the state is not immune from paying the fees because they are costs, but that the state cannot toll the amassing of these fees through good faith attempts to settle an action because the attorney's fees are not costs. The Court should not permit such an injustice to occur; it should follow the lead of Hutto and again hold that \$1988 attorney's fees are costs, and

(footnote continued from proceeding page)

See also, Baldwin Cooke Company v. Keith Clark, Inc., 73 F.R.D. 564, (N.D. Ill. 1976) and Honea v. Crescent Ford Truck Sales, Inc. 394 F.Supp. 201 (E.D. La. 1975) (where the courts, in dicta, assume attorney's fees would be barred under Rule 68).

But, cf., Cruz v. Pacific American Insurance Corporation, 337 F.2d 746 (9th Cir. 1974) (an action on a policy of insurance, where the court held an offer to pay costs, did not require defendant pay plaintiff's attorney's fees as part of costs); and, Gamlan Chemical Co. v. Dacar Chemical Products Co., 5 F.R.D. 215 (W.D. Pa. 1946) (an action arising under the copyright laws, where the court held an offer to pay costs did not include an offer to pay attorney's fees).

that a less prevailing plaintiff is not entitled to the recovery of post-offer of judgment legal fees.

The question of attorney's fees as costs was also discussed in Delta Air Lines, Inc. v. August, 450 U.S. 346, 67 L.Ed.2d 287, 101 S.Ct. 1146 (1981). While the majority opinion contains no consideration of the question of attorney's fees as costs, Justice Powell, in his concurring opinion, states succinctly:

A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party. It follows, therefore that the 'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer.

The purposes of Title VII and Rule 68 each would be served by this plain-language construction of the relationship between the statute and the Rule. To be sure, Title VII's fee provision was designed to enable plaintiffs to vindicate their rights through litigation. On the other hand, parties to litigation and the public as a whole have an interest -- often an over-

riding one -- in settlement rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits.

450 U.S. at 363. (emphasis added) (citation omitted).

As Justice Powell recognized, Rule 68 encourages parties to settle lawsuits. The sanction necessary to achieve that result is the cost-shifting provision. To get the benefit of this sanction, a defendant, among other things, must be willing at the time of the offer to pay plaintiff's accrued costs. In a civil rights situation, the willingness to pay costs must include a recognition of the requirement to pay reasonable attorney's fees.⁷

⁷ In the dissent, the argument is made that, in 1938, when Rule 68 was promulgated, costs did not typically include attorney's fees. 450 U.S. at 376-377. While this point has validity when raised with respect to §1927, a punitive statute that the legislators most probably did not have on their minds at the time the civil rights laws were enacted in 1976, it is considerably less apropos here when raised with regard to the Federal Rules of Civil Procedure. It is extremely unlikely that when enacting the civil

(footnote continued on next page)

As a result, the defendant should receive the benefit of the Rule when Plaintiff's recovery is less than the offer of judgment, and plaintiff's fees for the post-offer work should not be allowed.

CONCLUSION

A practical problem has been presented to the Court involving the everyday practice of law. It calls for a pragmatic, common sense approach that fairly interprets the provisions of the civil rights laws and Rule 68, and permits the civil rights defendant a reasonable means to attempt in

(footnote continued from preceding page)

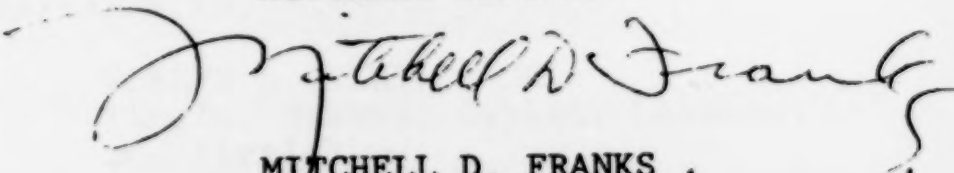
rights laws and designating attorney's fees as costs, Congress did not intend that the Federal Rules of Civil Procedure apply.

Also concern is expressed that a determination that fees are costs will impede a defendant's ability to settle civil rights actions. *Id.* at 379. But as is discussed *supra*, p. 9-11, unless the court of appeals is reversed, there will be no more settlements in civil rights actions.

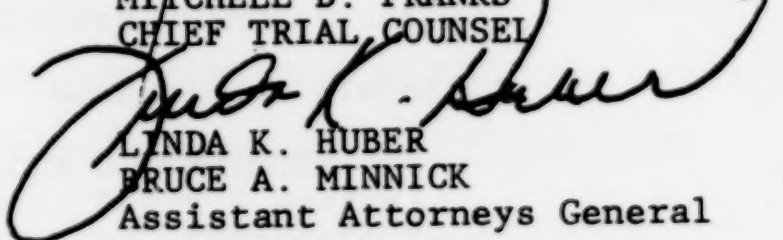
good faith to resolve an action through settlement. This result can only be achieved by reversing the court of appeals and holding that a less prevailing plaintiff is not entitled to the recovery of fees for work performed after the offer of judgment.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SOULA BITSOUNI

v.

CIVIL NO. H 77-337

SHERATON HARTFORD CORP.

APPEARANCES:

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(Rogin, Nassau, Caplan, Lassman,
and Hirtle)
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Counsel for Plaintiff

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Hartford, Connecticut

Counsel for Defendant

RULING ON APPLICATION FOR
ATTORNEY'S FEES AND COSTS

JOSE A. CABRANES, District Judge:

At the trial of this action, plaintiff prevailed on her claim that she had been wrongfully discharged from her position as a bellhop at defendant's Hartford hotel as a

result of sex discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), and she recovered damages in the amount of \$171.10. The second count of her complaint, under Conn. Gen. Stat. §31-126(a) (now Conn. Gen. Stat. §46a-60), was dismissed on the ground that the statute created no private right of action beyond a complaint to the Connecticut Commission on Human Rights and Opportunities. See Memorandum of Decision, filed August 3, 1983. Since she prevailed on her employment discrimination claim, it appears that plaintiff is entitled to the award of a reasonable attorney's fee under 42 U.S.C. §2000e-5(k) and costs under Rule 54(d), Fed.R.Civ.P.

On August 16, 1983, plaintiff's counsel submitted an Application for Allowance of Fees, requesting \$8,918.65 for attorney's fees and \$458.90 for costs. Defendant objects first, that both requests are "clearly excessive" in light of plaintiff's limited recovery, and second, that in any event plaintiff's award of

fees and costs must be limited by defendant's offer of judgment under Rule 68, Fed.R.Civ.P., tendered on August 23, 1982, and subsequently refused by plaintiff. In addition, defendant objects to the taxation of certain specific expenses as "costs."

I.

The award of fees in this case must initially be governed by the standards most recently enunciated by the Supreme Court in Hensley v. Eckerhart, 103 S.Ct. 1933 (1983). While Hensley v. Eckerhart itself concerned a fee award under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. §1988, the Court stated that the standards it set forth are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 103 S.Ct. at 1939 n.7. A district court has discretion in determining the amount of a fee award, but it must provide an explanation of its reasons. Id. at 1941. Particularly where an adjustment is requested

because of the exceptional or limited nature of the relief obtained, the court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained. *Id.* at 1941-42 & n.14. Although no precise formula governs the fee determination, *id.* at 1941, where a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be excessive. *Id.* at 1940. Moreover, although "the most critical factor is the degree of success obtained," *id.* at 1941, the term "degree of success" has not yet been definitively construed.

In this case, plaintiff prevailed on Count I of the complaint, her federal civil rights claim. She did not succeed on Count II, the state law claim, which was dismissed for the reason noted above. Because plaintiff was not the "prevailing party" with respect to Count II, it is appropriate to reduce the fee award by the

amount of the charges claimed for work on Count II. The record does not suggest that much, if any, additional time was spent in preparing or trying Count II above and beyond that which was necessary for preparation or trial of Count I. Thus, only time spent drafting Count II will be subtracted. Inasmuch as Count II and its self-contained prayer for relief constitute one-half of the complaint, and two hours are claimed for drafting the complaint as a whole, the court will reduce the number of hours compensated by one hour (charged at the rate of \$60).

The court does not agree with defendant's assertion that Hensley v. Eckerhart requires the court to award a fee which is less than that requested merely because plaintiff recovered only \$171.10. See Supplemental Memorandum in Opposition to Attorney's Fees (filed Oct. 3, 1983) at 10. As the court's August 3, 1983 Memorandum of Decision made clear, the amount of the compensatory damage

award was based on the evidence of plaintiff's earnings record and of her alternative employment, which served to mitigate actual damages. To reduce the requested award because the amount of damages recovered was small would be to reward defendant for plaintiff's diligence in seeking alternative employment after her wrongful dismissal. This the court declines to do. As Judge Kaufman wrote for our Court of Appeals in affirming a district court's award of almost \$50,000 to a major New York City law firm that had obtained a recovery of nominal damages of \$1 for its clients in an action under 42 U.S.C. §1983,

[t]he policy underlying the statute is to encourage litigants to assume the role of a private Attorney General. This policy may be served by granting a fee request even where a plaintiff is unable to prove actual damages resulting from his constitutional deprivation.

* * *

The fact that a plaintiff is awarded only nominal damages does not indicate that he has been unsuccessful or has not prevailed on his claim. Accordingly, the district

court did not err in declining to reduce the requested fee award simply because [plaintiff] was awarded only \$1 in nominal damages.

McCann v. Coughlin, 698 F.2d 112, 128-29 (2d Cir. 1983).

While there is no guarantee that the result in McCann would have been precisely the same if it had been decided after Hensley v. Eckerhart, the court believes that the general reasoning of McCann is still sound when applied to the facts of the instant case. The number of hours and the rates charged appear, moreover, to be reasonable. It is true that contemporaneous time records are now required in this Circuit for work performed after June 15, 1983, New York State Association for Retarded Children, Inc. v. Carey, No. 82-7531, slip op. 4563, 4583-4584 (2d Cir. June 15, 1983), but reconstructed records for work done before that date are acceptable. Birmingham and Morano v. SoGen-Swiss International Corp. Retirement Plan et al., No. 82-7934, slip op. 6483, 6499-6500

(2d Cir. Sept. 14, 1983). In any event, at oral argument on this application, defense counsel specifically waived any objection to the lack of contemporaneous documentation of time spent.

II.

Defendant's second objection to an award of fees and costs in the amount claimed stems from its offer of judgment pursuant to Rule 68, Fed.R.Civ.P.¹ On August 23, 1982, defendant offered to allow judgment to be taken against it in the amount of \$2000, with costs accrued to that date. Plaintiff did not accept the offer, and the case was tried to the court on September 21, 1982. Because its rejected offer of judgment exceeded plaintiff's eventual recovery when she prevailed on Count I, defendant asserts that the award of costs and attorney's fees must be limited to those incurred on or before August 23, 1982. Defendant's Memorandum in Opposition to Application for Attorney's Fees (filed Sept. 12, 1983) at 8, 10.

Section 706 of Title VII of the Civil Rights Act of 1964 states that

In any action or proceeding under his subchapter the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs . . .

42 U.S.C. §2000e-5(k) (emphasis supplied).

Our Court of Appeals has not addressed the question whether, in a civil rights action, the term "costs" for the purposes of Rule 68 includes attorney's fees, as it clearly does in the context of the fee-shifting provision of Title VII. The justices who discussed the issue in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), came to diametrically opposite conclusions. Justice Powell thought that "the 'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer," 450 U.S. at 362, while Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, saw "[n]othing in the fee-shifting provisions of [the civil rights]

statutes or their legislative history . . . which would suggest that Congress intended to amend Rule 68 by adding attorney's fees to otherwise taxable 'costs' under that Rule." 450 U.S. at 377.

Given the indefiniteness of the signals from the Supreme Court, it is not surprising that the courts of appeals which have addressed the issue have also divided on the question. The Seventh Circuit has rejected Justice Powell's position that "costs then accrued" under Rule 68 were equivalent to "costs" under the fee-shifting provisions of the civil rights acts, and thus included attorney's fees. Pigeaud v. McLaren, 699 F.2d 401, 402-03 (7th Cir. 1983). The Sixth Circuit, on the other hand, has recently adopted Justice Powell's view. Fulps v. City of Springfield, Tennessee, No. 82-5313, slip op. at 4-13 (6th Cir. Aug. 25, 1983). District courts addressing the issue have also divided. See, e.g., Waters v. Heublein,

485 F.Supp. 110 (N.D. Cal. 1979) and Scheriff v. Beck, 452 F.Supp. 1254 (D. Colo. 1978) (attorney's fees are included in "costs then accrued" for Rule 68 purposes in civil rights cases); Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980) (agreeing with Justice Powell's view but constrained to hold against it).

That there is a trend towards using fee-shifting to promote settlement can be inferred from the fact that the Judicial Conference Advisory Committee on Civil Rules proposed on August 23, 1983 that Rule 68, Fed. R. Civ. P., be amended to be entitled "Offer of Settlement," and to state, inter alia,

If the judgment finally entered is not more favorable to the offeree than an unaccepted offer that remained open 30 days, the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer, and interest from the date of the offer on any amount of money that such a claimant offered to accept to the extent such interest is not otherwise included in the judgment.

52 U.S.L.W. 2144 (Sept. 13, 1983) (emphasis in the original).²

If the above-quoted proposal were the law governing the case at bar, plaintiff, having rejected defendant's settlement offer (assuming, arguendo, that it had been open for the requisite length of time), would seemingly have to pay the attorney's fees incurred by defendant after the offer was made. Such a change in the law would effect a significant departure from the so-called "American Rule," which requires litigants to bear their own litigation expenses and attorney's fees absent statutorily authorized fee-shifting or the exceptional circumstances of the creation of a common fund by plaintiff, a litigant's willful disobedience of a court order, or the losing party acting wantonly, vexatiously, in bad faith, or for oppressive reasons. See Alyeska Pipeline Service Co. v. Wilderness Society et al., 421 U.S. 240 (1975).

If the court read the phrase "with costs then accrued" in the present Rule 68 to include attorney's fees, as Justice Powell has suggested, it would seem appropriate to adopt the same reading for the phrase "the costs incurred after the

making of the offer." If one were to adopt Justice Powell's position, defense counsel could logically have argued that Rule 68 as it now stands requires plaintiff to pay the attorney's fees of defendant which were incurred after the making of the offer of judgment. However, since defense counsel did not request an award of costs (including attorney's fees) incurred after the making of the offer of judgment, the court need not reach the question whether, under present law, plaintiff-offeree must pay defendant-offeror's attorney's fees incurred after the offer as part of the "costs."³

It should be noted that this construction of Rule 68, which approximates the proposed amended form of Rule 68, would significantly undermine the objectives of the fee-shifting provisions of the civil rights laws in any case with facts resembling those in the case at bar. Specifically, the policy underlying the cost-and-fee-shifting provision of Rule 68 (to encourage settlement)

would conflict directly with the policy underlying the fee-shifting provisions of the civil rights laws (to encourage private plaintiffs to litigate civil rights violations). In considering these conflicting policies, the court is mindful of Justice Brennan's admonition that "lower courts must not forget the need to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them." Hensley v. Eckerhart, supra, 103 S.Ct. at 1945 (Brennan, J., concurring in part and dissenting in part).

In the words of the Senate Commerce Committee, the various civil rights laws enacted by Congress over the last two decades were designed primarily to solve the problem of "the deprivation of personal dignity" that accompanies discrimination on account of race, sex, or age, in denials of equal access to public establishments or to the polls, or of equal opportunity in education or

employment. S. Rep. No. 872, 88th Cong. 2d Sess., 16. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring). As the Supreme Court has repeatedly stated, Congress enacted the provisions for counsel fees in the civil rights laws to encourage individuals injured by discrimination to seek judicial relief. See, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02 (1967) (per curiam). The private plaintiff who brings a civil rights action is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 412, 418(sic), quoting Newman v. Piggie Park Enterprises, supra, 390 U.S. at 402. Indeed, the civil rights statutes have come to occupy a fundamental place in protecting the ideal of equality under the law on which our society was founded and to which it aspires.

Against the backdrop of congressional priorities expressed in the civil rights laws' fee-shifting provisions, it seems incongruous to require that a successful civil rights plaintiff pay defendant's attorney's fees incurred after an offer of judgment is not accepted, if the recovery amounts to less than the offer. It would provide strong incentives for plaintiffs' attorneys to settle civil rights cases, possibly for less than they were worth, and substantial disincentives for attorneys to undertake problematic or difficult cases, even where significant civil rights violations are alleged in good faith. Not least, it would generally undermine the role in our society of the private attorney general as a significant agent in vindicating civil rights violations. As Justice Stewart wrote for a unanimous Court in Christiansburg Garment Co.,

to take the . . . step of assessing attorney's fees against plaintiffs would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the rigorous enforcement of the provisions of Title VII.

The resulting harm to the enforcement of the civil rights laws would far outweigh the possible gain in efficiency and conservation of judicial resources that such additional fee-shifting might have in deterring the prosecution or encouraging the settlement of non-meritorious litigation generally. Therefore, while the proposed amendment to Rule 68, with its express fee-shifting provision, would probably advance the generally desirable end of promoting settlements, it may effectively undermine (perhaps inadvertently) fee-shifting schemes deliberately adopted to advance the fundamental and salutary objectives of the civil rights laws.

All of these concerns -- including the fact that the proposed amendments to Rule 68 have not yet been adopted -- indicate that in cases brought in good faith (such as the instant case) the phrase in Rule 68, "the costs incurred after the making of the offer," like the phrase "with costs then accrued," should be construed to include only plaintiff's attorney's fees. This

construction has two consequences. First, an offer of judgment in a civil rights case will naturally include in the "costs" a reasonable attorney's fee incurred by plaintiff to the time of the offer. Second, if the offer is not accepted and the prevailing party recovers less than was available to him in the offer of judgment, as in this case, costs and fees incurred by plaintiff after the offer of judgment (i.e., in litigating the claims to the less successful conclusion) will be borne by the plaintiff.

Accordingly, in this case, where plaintiff refused defendant's offer of judgment of \$2000.00 plus costs accrued to the date of the offer, and plaintiff on her claim but only recovered \$171.10, plaintiff's award of a reasonable attorney's fee and costs under the fee-shifting statute and Rule 54(d), Fed. R. Civ. P., will not include the fees and costs incurred after the making of the offer of judgment of August 23, 1982.

III.

Defendant has challenged certain specific expenses which plaintiff's attorney has requested to be taxed as costs against defendant: specifically, attorney's travel expenses and lodging, incurred in connection with taking a deposition, computer research expenses and photocopying expenses. See Defendant's Memorandum in Opposition to Application for Attorney's Fees (filed Sept. 12, 1983) at 11-12; Supplemental Memorandum in Opposition to Application for Attorney's Fees (filed Oct. 3, 1983) at 11-14.

Since the charges for computer research and photocopying were incurred after the offer of judgment of August 23, 1982, and the court has ruled that costs incurred by plaintiff after the offer of judgment will not be taxed against defendant under Rule 68, it is unnecessary to discuss the computer or photocopying charges further.

As to expenses for travel and lodging incurred in connection with the taking of depositions, it is clear that such expenses are not taxable as costs under 28 U.S.C. §1920. City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1371 (1st Cir. 1971); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1170 (7th Cir. 1968). See also 10 C. Wright and A. Miller, Federal Practice and Procedure, § 2676 at 338 n.12, § 2677 at 371 n. 51. There are no exceptional circumstances in this case to justify taxation of travel to and from a deposition such as existed in Haviland & Co. v. Montgomery Ward & Co., 31 F.R.D. 578, 580 (S.D.N.Y. 1962), nor was prior authorization for those expenses sought from the court. Accordingly, the court will not tax as costs the transportation and lodging expenses claimed by plaintiff's counsel.

CONCLUSION

In sum, the court approves the application for all of plaintiff's attorney's fees through August 23, 1982, except for one hour spent

drafting Count II of the complaint; .1 hour at the rate of \$30 per hour⁴ (=\$3.00); 7 hours at \$50 per hour⁵ (=\$350.00); 28.16 hours at \$60 per hour⁶ (=\$1689.00); 12.15 hours at \$80 per hour⁷ (=\$972.00); .3 hour at \$85 per hour⁸ (=\$25.50); and 12.45 hours at \$100 per hour⁹ (=\$1245.00), for a total of \$4,284.50. See Application for Allowance of Fees (filed Aug. 16, 1983) and Affidavit of Robert L. Hirtle, Jr., re: Counsel Fees (filed Nov. 22, 1983). In addition, the court taxes against defendant statutorily authorized costs incurred through August 23, 1982 of \$94.57. See Application for Allowance of Fees (filed Aug. 16, 1983) and Affidavit of Robert L. Hirtle, Jr., re: Counsel Fees (filed Nov. 22, 1983).

It is so ordered.

Dated at Hartford, Connecticut, this 28th day of November, 1983.

Jose A. Cabranes
United States District Judge

FOOTNOTES

1. Rule 68, Fed. R. Civ. P., states:

At any time more than 10 days before trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.

An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. (emphasis supplied).

2. Presumably, one object of the proposed change is to widen the narrow and literal reading of Rule 68 by the Supreme Court in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), holding that costs accrued after the making of an offer of judgment which was not accepted are not recoverable by a defendant-offeror who litigates the claim to a successful conclusion, but only by a defendant-offeror where the plaintiff-offeree ultimately prevails, but with less success than if he had accepted the offer of judgment.

3. The court assumes without deciding that the question would be governed by the Supreme Court's holding in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1977) that a prevailing defendant is only to be awarded attorney's fees in a Title VII proceeding when the plaintiff's action is frivolous, unreasonable, or without foundation (even though that case did not involve an offer of judgment under Rule 68).
4. For work done by Maureen E. McNamara, a paralegal in May 1982.
5. For time spent by Robert L. Hirtle, Jr., a partner, in traveling to and from Washington, D.C. in April 1980.
6. For work done by Robert L. Hirtle, Jr., a between February 1975 and October 1978, and by Joan C. Guiney, an associate, between May 1982 and August 1982.
7. For work done by Robert L. Hirtle, Jr., a partner, between September 1979 and April 1980.
8. For work done by Robert L. Hirtle, Jr., a partner, in March 1981.
9. For work done by Robert L. Hirtle, Jr., a partner between May 1982 and August 1982.

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No. 83-1437

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,
Petitioners,

v.

ALFRED W. CHESNY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE PETITIONERS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI and
 LAWRENCE RHODE,
Petitioners,

v.

ALFRED W. CHESNY,
Respondent.

On Writ of Certiorari to the United States
 Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE
 EQUAL EMPLOYMENT ADVISORY COUNCIL
 IN SUPPORT OF THE PETITIONERS

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties¹ in support of the petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondis-

¹ Their consents have been filed with the Clerk of the Court.

criminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—*i.e.*, whether the defendants are required to pay, under 42 U.S.C. § 1988, the plaintiff's attorney's fees that were incurred after a valid offer of judgment under Rule 68 of the Federal Rules of Civil Procedure was rejected.

Because of its interest in the interpretation and operation of Rule 68 and 42 U.S.C. § 1988 and other attorney's fee provisions, EEAC filed amicus curiae briefs in this court in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981); *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. See, *e.g.*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The petitioners are police officers of the Village of Berkley, a municipal corporation in Cook County, Illinois, who were named as defendants in this civil action filed pursuant to 42 U.S.C. § 1983.² During the pendency of this suit in the district court, petitioners submitted to respondent an offer of judgment under Rule 68³ of the Federal Rules of Civil Procedure which read as follows:

Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki

² 42 U.S.C. § 1983 provides in relevant part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

³ Rule 68 reads in relevant part as follows:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.* (Emphasis added).

and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of One Hundred Thousand (\$100,000) Dollars. (Joint Appendix A-17).

The offer was refused by plaintiff Chesny, the case proceeded to trial, and the jury returned a verdict in favor of Chesny for \$60,000. The parties stipulated that Chesny's costs and attorney's fees incurred prior to the Rule 68 offer were \$32,000. Petitioners paid this amount to Chesny. Chesny filed a post-trial motion under 42 U.S.C. § 1988⁴ seeking approximately \$171,000 in additional fees for work performed after the offer was rejected. The petitioners objected to the payment of fees incurred after the rejection of their offer of judgment.

The district court, in an opinion reported at 547 F. Supp. 542 (N.D. Ill. 1982) (Shadur, J.), held that Chesny could not recover costs, including attorney's fees, incurred after the offer of judgment. In doing so, the court stated that "[b]ecause Section 1988 specifies attorneys' fees are awarded as part of 'costs,' it makes eminently good sense to give the same word the same content for Rule 68 purposes in a Section 1983 case." 547 F. Supp. at 547. In addition, the court reasoned that denying attorney's fees to the plaintiff who declined the offer of judgment

⁴ 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976, reads in relevant part as follows:

In any action or proceeding to enforce a provision of § 1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a *reasonable attorney's fee as part of the costs*. (Emphasis added).

would promote the policy of encouraging settlements. *Id.*

The court of appeals, in an opinion reported at 720 F.2d 474 (7th Cir. 1983), concluded "that the form of offer in this case is valid." 720 F.2d at 478. The Seventh Circuit, however, reversed the district court, holding that the Rule 68 requirement that the plaintiff pay "costs" did not prevent the award of attorneys fees to the plaintiff who "prevailed" in the lawsuit, even though the amount recovered was less than the offer. The court determined that to include attorney's fees within the meaning of "costs" under Rule 68 would undermine Congressional policy under § 1988 of awarding attorney's fees to prevailing parties under the civil rights statutes. *Id.*

SUMMARY OF ARGUMENT

A plain reading of Rule 68 and Section 1988, the understanding of the drafters of the two provisions, and the better reasoned lower court decisions all support a cut-off of attorney's fees incurred after a Rule 68 offer of judgment is rejected. Any other reading of Rule 68 and Section 1988 would greatly undermine the effectiveness of Rule 68 in promoting settlement and avoiding protracted litigation.

Rule 68 mandates that if the judgment obtained is not more favorable than a rejected offer of judgment, the offeree *must* pay the costs incurred after the rejection. Since Section 1988 provides for an award of attorney's fees "as part of the costs," Rule 68 should be read to prohibit the recovery of costs, including attorney's fees, incurred after an offer of judgment is rejected.

A number of well known and widely used provisions of federal law that allowed attorney's fees "as part of the costs" were in effect when Rule 68 was adopted. Thus, Congress was aware that attorney's fees could be included as "costs" within the meaning of Rule 68. Since Congress intended attorney's fees under Section 1988 to be treated as any other items of costs, Rule 68 should be read to prohibit an award of fees after an offer is rejected.

A rule that cuts off attorney's fees after an offer of judgment is rejected is consistent not only with the purpose of Rule 68, but also with the policies underlying Section 1988 which are to assure access to the federal courts, but to award fees only for the successful efforts of counsel. No policy under Section 1988 is served by awarding attorney's fees for work incurred after an offer of judgment is rejected where the additional efforts resulted in a less favorable recovery than the offer.

ARGUMENT

I. A PLAINTIFF WHO RECOVERS LESS THAN THE AMOUNT CONTAINED IN A VALID OFFER OF JUDGMENT UNDER RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE MAY NOT RECOVER ATTORNEY'S FEES INCURRED AFTER THE REJECTION OF THE OFFER.

Rule 68 of the Federal Rules of Civil Procedure provides that a plaintiff who rejects an offer of judgment and obtains a judgment "not more favorable" than the offer "must pay the costs incurred after the making of the offer." Fed. R. Civ. P. 68 (emphasis added). The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988,⁵ provides that a reasonable

⁵ See note 4, *supra*.

attorney's fee may be awarded to a prevailing plaintiff in an action under 42 U.S.C. § 1983 "as part of the costs." The plain reading of the two provisions, the understanding of the drafters of Rule 68 and the legislative history of Section 1988, and the better reasoned lower court decisions support a rule that prohibits a plaintiff from recovering attorney's fees incurred after a Rule 68 offer is rejected. Any other reading of the interplay between Rule 68 and Section 1988 would greatly undermine the effectiveness of Rule 68 in promoting settlement and preventing protracted litigation.

Since its adoption in 1938, Rule 68 has been widely recognized as "a simple and effective means to discourage the continuation of unnecessary litigation."⁶ A contemporary commentator noted that Rule 68 "might strongly influence the plaintiff to accept the defendant's offer; or, if the offer is not accepted, it, of course, relieves the offering defendant of the burden of future costs, thereby constituting an inducement to the making of such offers." Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 304 n.195 (1939).

Similarly, the Advisory Committee on the 1946 Amendments to Rule 68 stated that the rule "should serve to encourage settlements and avoid protracted litigation." Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments*, 5 F.R.D. 433, 483 n.1 (1946); see also 12 C. Wright and A. Miller, *Federal Practice and Procedure*,

⁶ Note, *Delta Air Lines, Inc. v. August: Taking the Teeth Out of Rule 68*, 43 U. Pitt. L. Rev. 765 (1982). It also has been noted that Rule 68 "represents a formidable settlement tactic." *Greenwood v. Stevenson*, 88 F.R.D. 225, 226 (D.R.I. 1980).

§ 3001, p. 56 (1973); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 68.02, p. 68-4 (1984).⁷ In *Staf-fend v. Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219-20 (N.D. Ohio 1969), the district court noted that:

Rule 68 is intended to encourage early settlements of litigation. It is also intended to protect the party who is willing to settle from the burden of costs which subsequently accrue. The provision in the rule which imposes costs upon a party who refuses an Offer of Judgment and who later recovers no more than the offer also puts teeth in the rule and makes it effective by encouraging acceptance.

This Court recognized in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) that "[t]he purpose of Rule 68 is to encourage the settlement of litigation." See also, *id.*, at 378 ("the intent of the rule . . . is to encourage settlement") and 379 n.5 ("the purpose behind Rule 68, which this case involves, is to promote *settlement* and thereby diminish the number of trials necessary to resolve the cases which are filed in the federal courts.").

Rule 68 itself is stated in mandatory language. It states that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer." (Emphasis added) Numerous courts

⁷ It has been noted that Rule 68 constitutes a "deliberate and calculated means by which to encourage defendants to employ offers of judgment, and thus accomplish the ultimate end of averting unnecessary litigation." Note, *Delta Airlines, Inc. v. August: Taking the Teeth Out of Rule 68*, *supra*, 43 U. Pitt. L. Rev. at 770.

and commentators have noted the mandatory nature of the language of Rule 68. See, e.g., *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974) ("It cannot be questioned that the rule itself is couched in mandatory terms"); Note, *Delta Air Lines, Inc. v. August: The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604, 610 (1983) ("Unlike Rule 54(d), Rule 68 is couched in semantically mandatory terms"). It is well recognized that "the word 'must' is so imperative in its meaning that no case has been called to our attention where that word has been read 'may.'" *Berg v. Merchant*, 15 F.2d 990, 991 (6th Cir. 1926), *cert. denied*, 274 U.S. 738 (1927). Thus, it cannot reasonably be disputed that a plaintiff who rejects a Rule 68 offer and recovers less than the offer *must* pay the costs incurred after the offer. Thus, if attorney's fees are construed to be "costs" within the meaning of Section 1988, Rule 68 would mandate that such fees incurred after an offer is rejected may not be recovered.

The Attorney's Fees Awards Act treats fees as a component of costs. Section 1988 reads in pertinent part as follows:

In any action or proceeding to enforce a provision of [§ 1983], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee *as part of the costs*. (Emphasis added)

The district court in this case reasoned that since Section 1988 includes attorney's fees "as part of the costs," Rule 68 mandated that attorney's fees incurred after the rejection of an offer were not recoverable. The court stated that "[b]ecause Section

1988 specifies attorney's fees are awarded as part of 'costs,' it makes eminently good sense to give the same word the same content for Rule 68 purposes in a Section 1983 case." 547 F. Supp. at 547. Although it conceded that the district court's approach was "in a sense logical," the Seventh Court held that the district court erred in its "rather mechanical linking up of Rule 68 and section 1988." 720 F.2d at 478. It is submitted that the district court's reading of the interplay between Rule 68 and Section 1988 is supported not only by a plain reading of the rule and statute, but also by the better reasoned decisions of the lower courts.

Rule 1 of the Federal Rules of Civil Procedure states that "[t]hese rules govern the procedure in the United States district courts in *all* suits of a civil nature whether cognizable as cases at law or in equity." (Emphasis added) It is well established that the Federal Rules of Civil Procedure have the force of a federal statute, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941), and that a court should strive to adopt the construction of a statute that reconciles it with other statutory provisions. See *Kokoszka v. Bedford*, 417 U.S. 642, 650 (1974); *Heiden v. Cremin*, 66 F.2d 943, 946 (8th Cir.), *cert. denied*, 290 U.S. 687 (1933). The interpretation of Rule 68 and Section 1988 that is most consistent with the plain meaning and purposes of the provisions is that of the Sixth Circuit in *Fulps v. City of Springfield, Tenn.*, 715 F.2d 1088, 1092-93 (6th Cir. 1983), where the court stated that:

When Congress drafted 42 U.S.C. § 1988, it described attorney's fees "as a part of the costs." Congress could have simply authorized the recovery of attorney's fees, but it chose to go fur-

ther and characterize the fees as costs. Required, as we are, to construe the language of a statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs.

It is submitted that the court's conclusion in *Fulps* "that the term 'costs,' as used in Rule 68, should be read to include attorney's fees, where fees are authorized by the substantive statute at issue in the litigation," 715 F.2d at 1095, is correct.

A number of other courts that have considered the issue have determined that attorney's fees under section 1988 or other civil rights fee provisions should be considered to be "costs" within the meaning of Rule 68. For example, in *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 114 (N.D. Cal. 1979), the court held that "an offer, if it exceeds the judgment finally obtained, bars the recovery of the relevant fees." The court in *Waters* also noted that:

[T]he relevant statutory fees provisions authorize the award of fees *as part of costs*. To award fees for time expended during a part of the case for which the Rule absolutely precludes the award of costs . . . would stand the Rule on its head. *Id.* at 115.

Similarly, in *Bitsouni v. Sheraton Hartford Corp.*, 33 FEP Cases 898, 902 (D. Conn. 1983), the court, after noting "a trend towards using fee-shifting to promote settlement," *id.* at 901, held that a plaintiff who recovered less than a rejected offer of judgment

may not recover his attorney's fees incurred after the rejection. See also *Lyons v. Cunningham*, 583 F. Supp. 1147, 1157 (S.D.N.Y. 1983) ("the majority of cases and the more reasoned view in the Court's opinion supports defendant's contention that in a civil rights action attorneys' fees are costs for the purposes of Rule 68"); *Mirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 734 (7th Cir.), cert. denied, 439 U.S. 1039 (1978) (Swygert, dissenting) ("If a plaintiff's settlement demands are unreasonable, a defendant may make an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Once a defendant makes such an offer, he is not liable for plaintiff's costs and attorney's fees if plaintiff does not ultimately recover the amount of the offer"). Finally, a leading treatise on employment discrimination law has stated that "[i]f the plaintiff does not recover a more favorable judgment than the offer, the plaintiff is not entitled to attorney's fees incurred after the date of the offer." B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1530 (2d Ed. 1983).⁸

In reaching its decision, the Seventh Circuit implied that "costs" under Rule 68 should not be read

⁸ Lower court decisions in *Gamlen Chemical Co. v. Dacar Chemical Products Co.*, 5 F.R.D. 215 (W.D. Pa. 1946), *Cruz v. Pacific Am. Ins. Corp.*, 337 F.2d 746 (9th Cir. 1964) and *Greenwood v. Stevenson*, 88 F.R.D. 225 (D. R.I. 1980), do not support a contrary result. Each of these cases involved the issue of whether a defendant intended to include attorney's fees in the offer of judgment. Thus, the issue of the effect on fees of a rejected offer was not the dispositive issue in these cases. As such, these decisions provide neither support for the Seventh Circuit's decision nor guidance to this Court.

to include attorney's fees because "[t]he award of attorney's fees to prevailing plaintiff's was uncommon in 1938, although not unknown." 720 F.2d at 477. This reading of Rule 68, however, ignores the numerous statutes in effect in 1938, when Rule 68 was enacted, that contain language similar to Section 1988. For example, Section 40 of the Copyright Act of 1909, 17 U.S.C. § 40 (1940 ed.), provided that a court was empowered to "award to the prevailing party a reasonable attorney's fee as part of the costs." See also 15 U.S.C. § 15 (1914); 15 U.S.C. § 77(k); 7 U.S.C. § 210(f) (1921), among numerous others set forth in petitioners' brief. It is clear that at the time Rule 68 was adopted, there were a number of well known and widely used provisions of federal law that allowed attorney's fees to be awarded "as part of the costs." Thus, the implication of the Seventh Circuit's decision in this case that the drafters of Rule 68 would not have envisioned attorney's fees being included as part of "costs" is refuted by the numerous statutes in effect in 1938 that contained language virtually identical to section 1988. In addition, as previously stated, the plain meaning of the statutory language indicates that Congress defined "costs" as including attorney's fees.

This Court noted in *Hutto v. Finney*, 437 U.S. 678, 697 (1978), that "[t]here is ample precedent for Congress' decision to authorize an award of attorney's fees as an item of costs." In that case, the Court also recognized that "there are a large number of statutory and common-law situations in which allowable costs include counsel fees." *Id.* The legislative history of Section 1988 clearly recognizes that

attorney's fees under Section 1988 should be treated as other items of costs. For example, the Senate Report on Section 1988 stated that:

[I]t is intended that the attorneys' fees, *like other items of costs*, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). S. Rep. No. 94-1011, p. 5 (1976) (footnotes omitted and emphasis added), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913.

Thus, it is apparent that Congress intended attorney's fees under Section 1988 to be treated as other items of costs. Congress was aware that Rule 68 prevents the recovery of "costs" incurred after an offer of judgment is rejected. Given this awareness and its intent that attorney's fees would be treated "like other items of costs," it is clear that the result of the Seventh Circuit herein is inconsistent not only with a plain reading of Rule 68 and Section 1988, but also with the Congressional intent underlying the enactment of Section 1988.

In reaching its decision, the Seventh Circuit relied heavily on this Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), which held that "costs," as used in 28 U.S.C. § 1927, did not incorporate the definition of costs used in Title VII. In *Roadway Express*, the Court concluded that 28 U.S.C. § 1927 was intended by Congress to include only those "costs" specified in 28 U.S.C. § 1920, which did not include attorney's fees. As Justice

Powell, the author of the *Roadway Express* opinion, later noted:

In this case [*Delta Air Lines, Inc. v. August*], by contrast, the entitlement to "costs," including an attorney's fee, arises under Rule 68 of the Federal Rules of Civil Procedure. In approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation. *Delta Air Lines, Inc. v. August*, 450 U.S. at 463 n2.

After analyzing the *Roadway Express* decision and Justice Powell's explanation in *Delta Air Lines*, the Sixth Circuit in *Fulps v. City of Springfield, Tenn.*, 715 F.2d at 1095, concluded "that the *Piper* decision does not preclude our conclusion here that the term 'costs,' as used in Rule 68, should be read to include attorney's fees where fees are authorized by the substantive statute at issue in the litigation." It is submitted that the Sixth Circuit's reading of *Roadway Express* is correct and should be adopted by this Court.

A plain reading of the interplay between Rule 68 and Section 1988 and the understanding of the framers of the two provisions are entirely consistent with the petitioners' interpretation urged herein. Thus, in the absence of some overriding interest in excepting Section 1988 from the normal operation of Rule 68, Rule 68 requires a cut-off of costs, including attorney's fees, following a rejection of an offer of judgment. As set forth in part II, below, not only is there no overriding policy reason for excepting section 1988 from the operation of Rule 68, there are compelling policy reasons for not doing so.

II. A RULE PROHIBITING A PLAINTIFF FROM RECOVERING ATTORNEY'S FEES AFTER A RULE 68 OFFER IS REJECTED IS CONSISTENT WITH THE PURPOSE OF RULE 68 AND DOES NOT CONFLICT WITH THE POLICIES UNDERLYING SECTION 1988.

The decision of the district court herein cutting off attorney's fees after the rejection of an offer of judgment was reversed by the Seventh Circuit because it "puts Rule 68 into conflict with the policy behind Section 1988." 720 F.2d at 478. The Seventh Circuit reasoned that the denial of attorney's fees after an offer is rejected would require a plaintiff to "think very hard," *id.* at 479, before rejecting an offer. The purpose of Rule 68, however—to require *both* sides to undertake a realistic assessment of their positions and to promote settlement and avoid protracted litigation—is no less important in civil rights cases than it is in other civil actions. As set forth below, an approach cutting off attorney's fees after an offer is rejected is the only way in which the important goals of Section 1988 can be reconciled with the equally important purposes behind Rule 68.

Justice Powell, in his opinion in *Delta Air Lines*, 450 U.S. at 363, recognized the importance of settlement when he stated that "parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings" (emphasis added).⁹

⁹ This Court has recognized on other occasions that there exist strong policy reasons favoring the compromise and settlement of litigation, including the cost and drain on judicial resources that are spared by such settlements. See, e.g., *Williams v. First National Bank*, 216 U.S. 582, 595 (1910). This policy favoring compromise and settlement is particularly

As set forth in part I, above, the drafters of Rule 68 intended it to serve this "overriding purpose" of promoting settlement. A reading of Rule 68 which would preclude an award of attorney's fees for work incurred after an offer of judgment is rejected promotes the purpose of Rule 68 by requiring *both* parties to realistically assess the lawsuit to determine whether the case can be resolved short of litigation. As one commentator has noted:

Unless 'costs' is interpreted to include not only taxable costs but also attorney's fees . . . rule 68 will remain an ineffective weapon in the litigator's arsenal. When, however, the 'costs' provision is read to include the attorney's fees of the plaintiff, rule 68 becomes a dynamic tool in litigation, fulfilling the purpose of encouraging settlement in cases involving statutorily authorized attorney's fees without sacrificing the high ideals of those statutes. Note, *Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation of the Scope and Purpose of Rule 68*, 16 Ga. L. Rev. 482, 486 (1982) (hereinafter "*Offer of Judgment*").

The interest of the plaintiff in an early settlement cannot be discounted. An interpretation of Rule 68

strong in employment discrimination cases, where both Congress and the courts clearly have recognized that voluntary compliance is the preferred means of eliminating employment discrimination. See, e.g., *W.R. Grace & Co. v. Local Union 759*, 103 S.Ct. 2177, 2186 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 203-04 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). It should be noted that many of the decided cases involving Rule 68 offers have contained allegations of employment discrimination or other civil rights violations.

that would cut off a defendant's liability for attorney's fees provides a strong incentive to a defendant to extend Rule 68 offers and provides a plaintiff a quicker means of recovery than normally is available in protracted federal suits. *Cf. Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982). On the other hand, as one commentator has noted, "[i]f fees are not defined as 'costs,' counsel may be tempted to place his interest above that of the client and reject a reasonable offer of judgment solely with the hope of recovering greater fees." *Offer of Judgment*, 16 Ga. L. Rev. at 499. Thus, it is apparent that the rule advocated herein is consistent with and would promote the purposes underlying Rule 68.

"The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976)." *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1937 (1983). Accordingly, this Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (per curiam). In *Hensley v. Eckerhart*, 103 S.Ct. at 1941, however, this Court held that attorney's fees awards must take into account the degree of success of the lawsuit. As discussed below, a rule that cuts off attorney's fees incurred after the rejection of a Rule 68 offer is consistent with these important policies underlying Section 1988.

As noted above, the award of pre-offer attorney's fees to a prevailing party is consistent with the policies underlying Section 1988 since it serves to encour-

age the enforcement of the civil rights laws by competent counsel. No policy under Section 1988, however, is served by awarding fees incurred after an offer of judgment is rejected. As the court noted in *Waters v. Heublein, Inc.*, 485 F. Supp. at 114-15:

Rule 68 is designed to prevent needless litigation by punishing a party that chooses to reject a reasonable settlement offer. Awarding fees covering their pre-offer work to attorneys who settle cases through acceptance of an offer of judgment advances the purposes underlying the fees provision. On the other hand, applying Rule 68 to bar the recovery of post-offer fees in a case in which a party has rejected a reasonable offer that ultimately exceeds the judgment does not unduly interfere with the operation of this provision. Since the pre-offer efforts of the attorney reached a result more favorable to the client than the verdict, there seems little reason to reward that attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits. Thus, this application of the Rule should work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation (footnote omitted).

As one commentator has noted, "to refuse to award fees to an attorney whose mistaken judgment and rejection of an offer of judgment resulted not in a more favorable recovery but rather in a less favorable one does not contravene the purpose of these statutes." *Offer of Judgment*, 16 Ga. L. Rev. at 504.

A cut off of attorney's fees *after* an offer of judgment is rejected also is consistent with this Court's

decision in *Hensley v. Eckerhart*, 103 S.Ct. 1933. In *Hensley*, the Court stated that:

Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained. Id.* at 1941 (emphasis added).

Thus, in the instant case, a cut off of attorney's fees after the offer was rejected is entirely consistent with *Hensley* since the work performed after the offer produced *no* more favorable recovery and in fact resulted in a less favorable recovery than the offer. That the plaintiff "prevailed" in the suit is not a sufficient reason for granting post-offer fees since no additional relief was obtained as a result of counsel's post-offer efforts. As this Court noted in *Hensley*, 103 S.Ct. at 1941, "[t]hat the plaintiff is a 'prevailing party' therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."¹⁰

¹⁰ The district court in *Neal by Neal v. Berman*, 576 F. Supp. 1250, 1253 (E.D. Mich. 1983), acknowledged this limitation on a plaintiff's right to fees as follows:

The Court's reasoning in this opinion will have the obvious and intended effect of encouraging defendants in civil rights cases to make reasonable settlement offers, and to memorialize those offers on record. Plaintiffs in such cases will then be compelled to take a hard look at the expected result of their lawsuit. *A plaintiff who unreasonably overestimates the likelihood of success and probable amount of recovery, and thereby pushes his case to trial, should not be able to transfer the costs of the trial to the defendant, because those costs were not necessarily incurred in securing the desired result.* (Emphasis added)

As noted above, this Court has held that a prevailing plaintiff ordinarily should recover attorney's fees "unless special circumstances would render such an award unjust." *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 416-17; *Newman v. Piggie Park Enterprises*, 390 U.S. at 402. It is submitted that the rejection of a Rule 68 offer and the ultimate recovery of less than the offer constitutes "special circumstances" that provide additional support for cutting off post-offer fees.

The Seventh Circuit herein feared that attorneys might "be deterred from bringing good faith actions to vindicate fundamental rights," 720 F.2d at 479, if attorney's fees are not available for work done after an offer is rejected. It is clear, however, that a rule providing for a cut off of attorney's fees after a rejected offer of judgment will not prevent or unduly discourage plaintiffs from pursuing civil rights actions. As the Supreme Court of Alaska has noted:

Rule 68 does not stop anyone from filing a lawsuit. It is designed to encourage reasonable settlements after the lawsuit is filed. *Scott v. Robertson*, 583 P.2d 188, 195 (Alaska 1978).

All Rule 68 requires a plaintiff to do is to make a realistic assessment of the value of the lawsuit and to accept or reject a defendant's offer on the basis of that assessment.

Finally, it must be borne in mind that this case involves not only the interplay between Rule 68 and Section 1988, but also numerous fee-shifting statutes. The Seventh Circuit in its opinion stated that federal statutes allowing attorney's fees in the mid-1970's "range from 75 to 90." 720 F.2d at 477. It is submitted that a reading of Rule 68 that does not pro-

vide for a cut off of attorney's fees after an offer is rejected will have the practical effect of rendering Rule 68 of no practical value in any case were attorney's fees are provided for. It is highly doubtful that the drafters of Rule 68 could have intended such a result.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether those attorney's fees of a civil rights plaintiff which are incurred after an offer of judgment (Fed. R. Civ. P. 68) must be paid by the defendant under the Civil Rights Attorney's Fees Awards Act (Title 42 U.S.C. § 1988), when the plaintiff rejects the defendant's valid Rule 68 offer of judgment and then fails to recover an amount on verdict in excess of the defendant's offer.

2. Whether attorney's fees' already paid to an attorney for a civil rights plaintiff under a contingent fee contract with plaintiff, should be disregarded by the district court in awarding "a reasonable attorney's fee" under Title 42 U.S.C. § 1988, although the contingent fee contract in violation of the local rule for the district court was not filed and was not disclosed on the record until the oral argument in the United States Court of Appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE PETITIONERS¹**OPINIONS BELOW**

The opinion of the Seventh Circuit Court of Appeals
(Pet. A. A1-11) is reported at 720 F. 2d 474 (7th Cir. 1983).

The opinion of the district court (Pet. A. B1-12) is
reported at 547 F. Supp. 542 (N.D. Ill. 1982).

¹ The authors gratefully acknowledge the contributions and
suggestions made by Professor Roy D. Simon, Jr., Assistant Professor
of Law, Washington University School of Law, during the prepara-
tion of the Brief.

JURISDICTION

Judgment of the Seventh Circuit Court of Appeals was entered on November 3, 1983. (J.A. 11) A petition for rehearing *en banc* was denied on January 20, 1984 with Justices Bauer, Coffey and Pell dissenting. (J.A. 12). On February 29, 1984, the Petition for a Writ of Certiorari was filed with the Supreme Court of the United States. (J.A. 13) Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(a). On April 23, 1984, the Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals was granted by the United States Supreme Court. (J.A. 13)

STATUTES INVOLVED

United States Code, Title 42, § 1988 as amended. Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of § 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964,

the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rules of Civil Procedure, Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with the proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

General Rule 39 of the United States District Court, Northern District of Illinois Eastern Division appears in Pet. A. D.

STATEMENT OF THE CASE

The petitioners Jeffrey Marek, Thomas Wadycki and Lawrence Rhode are police officers employed by the Village of Berkley, located in Cook County, Illinois. (R. 1) On October 5, 1979, a civil rights action was filed by Alfred Chesny, Sr., whose adult son had been killed during a confrontation with the three officers. (R. 1) The Village of Berkley, the village president, and the police chief were also named as defendants. (R. 1)

Before a pre-trial was held (J.A. 3-4), petitioners submitted an offer of judgment pursuant to Rule 68 to respondent's attorney (J.A. 16-17). This offer of judgment, transmitted to the respondent on November 5, 1981, stated as follows:

Pursuant to Federal Rule of Civil Procedure 68, the defendants Jeffery Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of One Hundred Thousand (\$100,000) Dollars. (J.A. 17).

The respondent failed to accept the offer of judgment. Five and one-half months later, on April 19, 1982, a jury trial was begun (J.A. 4). The jury did return a verdict for the respondent and against the three police officers but only for a total of \$60,000. (R. 119) The sum of \$5,000 was awarded for the "wrongful death", the sum of \$52,000 for violation of civil rights and a sum in total of \$3,000 for punitive damages. (R. 119) The Village of Berkley and the police chief were found not guilty (J.A. 6). The village president, Leslie David, was granted a directed verdict (R. 118).

The petitioners tendered payment of judgment on verdict, which respondents refused (R. 122). The monies were deposited with the clerk of court in accord with order of the court (R. 122). During the pendency of the post trial motions, the petitioners and the respondent with the court's prompting (Pet.

A. B-11) agreed that the respondent's attorney's fees for the legal work done prior to the November 1981 offer of judgment, totalled \$32,000 (J.A. 10). This sum was a compromise from the respondent's fee petition of \$34,392.35 (J.A. 24). The \$32,000 was paid by the petitioners to the respondent under the court's award of that amount under § 1988 (J.A. 24).

The respondent by post-trial motion demanded that his attorney's fees accrued after the November, 1981 offer of judgment through the trial be paid by the petitioners (R. 139). These additional fees were claimed to be about \$171,000 (R. 139).

The petitioners interposed an objection to the payment of post-offer fees and filed the Rule 68 offer of judgment with the court (R. 144). The verdict of \$60,000 did not exceed the \$100,000 offer. The trial court assumed that the respondent's judgment was not more favorable than the petitioner's offer (Pet. A. B-9). The petitioners urged the trial court to hold that the respondent's post-offer of judgment attorney's fees, defined as part of § 1988 costs, should remain the respondent's responsibility (R. 144).

In its memorandum opinion ruling on this issue, the district court agreed with petitioners. (Pet. A. B-9) The district court held that the term "costs" in Rule 68 should include attorney's fees within the meaning of Title 42 U.S.C. § 1988, which specifically states that attorney's fees may be allowed by the court in its discretion "as part of the costs". (Pet. A. B-9) Judge Shadur held that the respondent is precluded from recovering his attorney's fees for work performed post-offer of judgment, since the judgment obtained was not more favorable than the offer. (Pet. A. B6-9) In deciding the issue, Judge Shadur relied upon *Waters v. Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979). (Pet. A. B-7-9).

The district court in the memorandum opinion also analyzed the policy considerations behind § 1983 and the congressional encouragement of "vigorous enforcement". (Pet. B-9). In holding that the *Waters* result is proper and that the inclusion of attorney's fees as part of the costs under Rule 68 upholds the congressional intent of § 1988, the district court stated that it was not going to "adopt a wrong rule because the right one may have a harsh application in a few cases". (Pet. A. B-9). While emphasizing the policy considerations behind § 1988, Judge Shadur also cited with approval the strong policy considerations of promoting settlement of litigation. (Pet. A. B-9)

The case was appealed by the respondent to the United States Court of Appeals. (J.A. 10) The Seventh Circuit reversed Judge Shadur's opinion. (J.A. 11) In its opinion, (Pet. A. A1-11) the Seventh Circuit found reversal to be necessary, because of its view of the congressional policy behind the Civil Rights Attorney's Awards Fees Act, 42 U.S.C. § 1988. The Seventh Circuit expressed concern that a "little known and little used" rule from the Federal Rules of Civil Procedure should not be allowed to undercut claims for fees by plaintiffs' civil rights attorneys. (Pet. A. A-2, 10). In reaching this conclusion, the Seventh Circuit did not follow *Fulps v. City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983) which held that the word "costs" in Rule 68 does include attorney's fees when an applicable statute such as § 1988 allows attorney's fees to be taxed as costs to the prevailing party. (Pet. A. A-10, 11). According to the opinion, the decisive precedent for not following *Fulps* is this Court's opinion in *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980). (Pet. A. A-11) *Roadway Express* held that the costs, defined in 28 U.S.C. § 1920, which may be assessed against an attorney who so multiplies the proceedings unreasonably and vexatiously (under § 1927), did not include

attorney's fees in a civil rights case. (Pet. A. A-11) Accordingly, the Seventh Circuit held on November 3, 1983, that the respondent should receive an award of all fees for services beyond the offer of judgment date. (Pet. A. A-11) The case was remanded to the district court to determine a reasonable fee for those services. (Pet. A. A-11).

The respondent's attorney in oral argument before the court of appeals on June 3, 1983, revealed on the record that he had a written, contingent fee contract with his client (Pet. A. A-6). This agreement had not been filed with the United States District Court, contrary to General Rule 39 for the Northern District of Illinois which requires that any contingent fee agreement be filed at the time the complaint is filed with the clerk of the district court (Pet. A. D; J.A. 46). The terms of the agreement were finally disclosed (J. A. 51), after the petitioners filed a petition for rehearing *en banc* in the Seventh Circuit based in part upon the respondent's failure to advise anyone of the contingent fee agreement. (J. A. 34-35). The petitioners contended in the petition for rehearing *en banc* that the contingent fee agreement is a significant factor to be considered in assessing any reasonable attorney's fee under § 1988 (J.A. 36). After receiving an answer from the respondent to the petition for rehearing, (J.A. 39), the Seventh Circuit denied the petition for rehearing *en banc* with three justices dissenting (Pet. A. C-1).

SUMMARY OF ARGUMENT

I. In this case, petitioners, defendants in the district court, made a Rule 68 offer of judgment which included the attorney's fees for the civil rights plaintiff as part of the costs. Respondent did not accept the offer, which ultimately proved to be greater than the sum of the jury verdict plus respondent's fee award for pre-offer legal work. The Seventh Circuit opinion held, notwithstanding Rule 68, that respondent can recover his post-offer of judgment attorney's fees under § 1988, because the denial of such fees would blunt the effectiveness of the Civil Rights Act of 1964 and would be contrary to congressional policy. 42 USC, § 1983, § 1988.

The petitioners' position is that the express congressional intent of § 1988 was to allow § 1988 attorney's fees to be paid to prevailing civil rights plaintiffs, but only within the framework of federal procedure.

Because of its express definition of "attorney's fees as part of the costs" and because of congressional commentary that attorney's fees be taxed "like other items of costs", § 1988 clearly contemplates a boundary on the term "attorney's fees". That boundary line is drawn by the Federal Rules of Civil Procedure, including Rule 68, which should govern civil rights cases.

Rule 68 and § 1988 can and should harmonize with each other. Rule 68's sole purpose is to settle protracted litigation. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). The purpose of the Rule, however, is negated by the circuit court opinion. Plaintiff's civil rights attorneys have now been, in effect, instructed by the Seventh Circuit to ignore Rule 68 offers of judgment, since the only "cost" of any significance—plaintiff's attorney's fees—will still be paid by defendants.

If Rule 68 and § 1988 are interpreted correctly, the Seventh Circuit's concern that congressional policy will be thwarted can be satisfied. Rule 68 promotes the vindication of the civil rights statutes by its very operation. Its acceptance immediately elevates plaintiff to the status of "prevailing party", which is certainly a higher position, when he accepts an offer, than his previous position. Rule 68 to be valid, while effective, must accomplish two goals: it must vindicate plaintiff's civil rights and it must compensate plaintiff's attorney for fees as part of the costs. This interpretation of § 1988's interaction with Rule 68 is in accord with numerous district court opinions and the Sixth Circuit Court of Appeals. *Fulps v. City of Springfield*, 715 Fed. 1088 (6th Cir. 1983).

In contrast, the Seventh Circuit's opinion in the instant case misapprehends a holding of this Court of when fees are to be considered as "costs", *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). The Circuit Court, also, fails to cite or rely on the relevant holding in *Hutto v. Finney*, 437 U.S. 678 (1977), where the correct view that "costs" include fees in a civil rights action is set forth.

II. Contingent attorney's fees must be considered in determining what is a reasonable attorney's fee under § 1988. Otherwise, a windfall profit can result. The policy of § 1988 is to vindicate civil rights by securing effective legal representation. It is not a policy to award unreasonable fees or to instigate suits to benefit lawyers. The respondent has already received a substantial attorney's fee which should be taken into account before any further fee award is made. The reasonable fee standard of *Hensley v. Eckerhart*, ____ U.S. ____, 103 S.Ct. 1933 (1983), is not satisfied unless the contingent fee paid is taken into account by the district court.

ARGUMENT

I. THE VINDICATION OF A PLAINTIFF'S CIVIL RIGHTS IS NEITHER HAMPERED NOR DETERRED BY CONSTRUING STATUTORY ATTORNEY'S FEES AS PART OF THE COSTS UNDER 42 U.S.C. § 1988 AND RULE 68.

A. RULE 68 SHOULD EXIST IN HARMONY WITH § 1988, IF THE INTENT OF BOTH LAWS IS TO BE UPHELD.

Section 1988 of the Civil Rights Attorneys' Fees Awards Act of 1976 provides that the trial court in its discretion may allow a "prevailing party" in a civil rights case a "reasonable attorney's fee as part of the costs." Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff in a federal civil case rejects an offer by the defendant to allow judgment to be taken against the defendant and if the plaintiff later obtains a judgment less favorable than the offer, then the plaintiff "must pay the costs incurred after the making of the offer."

The case at bar involves a civil rights plaintiff's rejection of a Rule 68 offer of judgment. That offer did expressly include attorney's fees as part of costs offered. The amount of the subsequent jury verdict plus the amount of pre-offer attorney's fees awarded by the district court totalled less than the amount of defendant's offer of judgment.

The petitioners here, who were the defendants in the trial court, present the question of whether the post-offer costs which the respondent must now bear include respondent's own "attorney's fees as part of the costs". 42 U.S.C. § 1988.

The facts of this case, under both the law and expressed congressional policies, mandate that the post-offer of judgment attorney's fees are "part of the costs" which the respondent must absorb. When respondent chose to reject an offer of

judgment which turned out to be more favorable than the subsequent verdict he won, plus the pre-offer fee which he was awarded, shifting of his post-offer attorney's fees was barred.

Rule 68 became part of the Federal Rules of Civil Procedure in 1938.² Thirty-eight years later, Congress enacted § 1988 with its specific statutory language that defines costs to include attorney's fees. Neither Rule 68 nor § 1988 was enacted in a vacuum. Fundamental legislative principles establish that statutes should harmonize with one another and apply in a consistent fashion. *Kokoszka v. Bedford*, 417 U.S. 642 (1974). The interpretation of § 1988 must be viewed within the framework of previously existing statutes and procedural rules. Judicial rulings should not create disharmony between the Civil Rights Acts and the Federal Rules of Civil Procedure, where conflict need not exist. Nor should judicial rulings elevate § 1988 beyond the reach of the federal court's procedural rules which were established to govern "all suits of a civil nature. . . ." Fed. R. Civ. P. 1³

To construe § 1988 as exempt from certain Federal Rules of Civil Procedure would be precedent for havoc in the federal judicial system. Undermining the structure of federal civil procedure would be the result of such construction.

The simplest and most basic solution to the case at bar is found by reading the plain language of the two laws involved. Attorney's fees are defined "as part of the costs" which a court may award under § 1988. The costs are the plaintiff's, not

² The Rule was amended in 1948 and again in 1966. The language of the Rule itself is derived from three state statutes from Minnesota, Montana and New York, which statutes were in existence prior to the enactment of the Federal Rule 68. 2 Minn. Stat. § 9323 (Mason 1927); 4 Mont. Rev. Codes Ann. § 9770 (1935); N.Y. Civ. Prac. Law § 177 (Cahill 1937).

³ Fed. R. Civ. P. 1 provides: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

defendant's obligation, after he rejects a Rule 68 offer of judgment and then recovers less on judgment. The obligation is not discretionary: the plaintiff *must* pay the costs under Rule 68's language; and part of those costs are his own attorney's fees incurred post-offer of judgment. While the Seventh Circuit rejected this approach in the case at bar by labeling it "mechanical" it is the one and the only approach which can harmonize the legislative intent of the statute with the rule of procedure to assure a unified, comprehensive judicial process.

The harmony of this approach is adopted by the Sixth Circuit in *Fulps v. City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983), which held:

When Congress drafted 42 U.S.C. § 1988, it described attorney's fees as "part of the costs". Congress could have simply authorized the recovery of attorney's fees, but it chose to go further and characterize the fees as costs. Required as we are to construe the language of the statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs. *Id.* at 1092-93.

The Sixth Circuit went on to conclude that a Rule 68 offer of judgment on a civil rights case will preclude the plaintiff from recovering attorney's fees after the offer of judgment, when the plaintiff recovers less on judgment than the amount of the offer.

When petitioners in the case at bar made the offer of judgment on November 5, 1982, they had to rely upon the language of Rule 68 and § 1988 and to harmonize one with the other. Especially here, the power to shape and articulate just rules of law in an adversary context is at the command of this Court. The adversary process must be subject to the orderly administration of justice under law, using rules of procedure. In obedience to Rule 68, the petitioners' offer of judgment not only would make the respondent whole, but would reasonably compensate the respondent's attorney. As a result, the offer

also honors and fully satisfies § 1988 of the Civil Rights Act. Construing attorney's fees to be part of the costs which become the plaintiff's own responsibility after the rejected offer of judgment, can only promote the litigation settlement policies underlying Rule 68. The Civil Rights Act and the Federal Rules of Civil Procedure should be found to be in harmony.

B. RULE 68 IS A LONGSTANDING PART OF THE UNIFIED, COMPREHENSIVE LAW OF FEDERAL CIVIL PROCEDURE.

Rule 68 has been part of the fabric of the Federal Rules of Civil Procedure for over 40 years. Its sole purpose is the promotion of settlements and the termination of protracted litigation.⁴ *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). 12 C. Wright & A. Miller, *Fed. Prac. and Proc.* §§ 3001-3005 (1973). While pre-trial and discovery rules can promote settlement, Rule 68 has had the unique distinction, since its inception, of being the only federal rule of procedure enacted solely to facilitate the settlement of lawsuits.⁵

The procedure in using Rule 68 is simple. The defendant may serve an offer not less than 10 days before trial upon plaintiff to allow judgment to be taken against the defendant, "for the money or property or to the effect specified in his offer, with costs then accrued." Fed. R. Civ. P. 68. Plaintiff then has 10 days to accept the offer, which if not accepted is deemed withdrawn. It is a simple, straightforward procedure, available to defendants only.

⁴ Professor A.M. Dobie observed in 1939: "This provision [Rule 68] in a case involving some doubt might strongly influence the plaintiff to accept the defendant's offer; or, if the offer is not accepted, it, of course, relieves the offering defendant of the burden of future costs, thereby constituting an inducement to the making of such offers." Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 304, n. 195 (1939).

⁵ As part of the 1983 amendments to the Federal Rules of Civil Procedure, Rule 16 now expressly designates a function of pre-trial to be to facilitate settlement. Prior to this new amendment, Rule 68 stood alone as the one officially expressed method of dispute resolution under the Federal Rules of Civil Procedure.

The results of a rejected offer of judgment are mandatory: "... If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must pay the costs incurred* after the making of the offer." (emphasis added). Such language leaves no ambiguity as to the plaintiff's duty. See, *Delta Air Lines v. August*, 450 U.S. 346 (1980) (Rehnquist, J. dissenting).

In the case at bar, the letter and spirit of Rule 68 were followed precisely by petitioners. The offer of judgment was made by petitioners five and a half months before trial, specifying a sum of \$100,000, including attorney's fees as part of "the costs then accrued". The offer of judgment was submitted by petitioners in an effort to resolve the lawsuit through settlement. The respondent disregarded the offer. At the end of a three week jury trial, the jury awarded respondent a total of \$60,000. Pre-offer attorney's fees of \$32,000 were agreed upon by the parties and approved by the court. Thus, respondent won \$8,000 less after trial than the \$100,000 offer of judgment. The respondent's total recovery was \$92,000, which is an amount "not more favorable than the offer." Fed. R. Civ. P. 68.

The opinion in the Seventh Circuit Court of Appeals, in this case derogates Rule 68 as "little known and little used." While the court expressed its annoyance, as if Rule 68 were a thorn in the side of § 1988, it does concede that Rule 68 is not "inflexibly drafted" and can easily encompass the statutory award of attorney's fees to prevailing parties. *Chesny v. Marek*, 720 F. 2d 474, 477 (7th Cir. 1983).

Petitioners would concur with the interpretation of federal procedure by the Seventh Circuit to the extent that the offer of judgment here made by the petitioners is valid in its inclusion of attorney's fees as part of the offer in the Seventh Circuit's view. A Rule 68 offer, because it allows judgment to be entered, would not be feasible in the face of a fee statute such as § 1988,

if the offer could not encompass all potential liabilities of the defendant in the lawsuit. Any civil rights defendant competently advised would balk at authorizing judgment to be entered against himself, if attorney's fees of an unknown amount would later be imposed upon him, because his accepted offer has made plaintiff a "prevailing party". In the instant case, the offer of judgment was made with the intent that the amount offered would terminate the lawsuit completely, with no further litigation costs or attorney's fees incurred by either side.

While the validity of petitioners' offer is upheld, the Seventh Circuit speculates that including attorneys' fees as part of the costs "would not have occurred to the draftsmen of Rule 68, because the award of attorney's fees to prevailing plaintiffs was uncommon in 1938, although not unknown—the copyright, securities, and antitrust statutes all allowed such awards." 720 F. 2d at 477. However, a closer reading of federal statutory history shows that federal laws providing for attorney's fees awards to prevailing parties were much more common in 1938 than the court of appeals opinion discloses. At least a dozen federal statutory provisions in nine different federal acts on the books in 1938 allowed the prevailing party to obtain an award of his attorneys' fees.⁶ These dozen statutes included not only antitrust,⁷ securities,⁸ and copyright laws,⁹ but also included the Communications Act of 1934, 47 U.S.C. §§ 206 & 407; the Merchant Marine Act of 1936, 46 U.S.C. § 1227; the Packers and Stockyards Act, 7 U.S.C. § 210(f) (1921); the Perishable

⁶ Appendix A to this brief contains a list of statutory provisions existing in 1938 which allowed a court to make an award of attorney's fees under the rubric of "costs." The *amicus* brief of the Solicitor General identifies 21 federal statutes (out of 27 attorney fee statutes) which in 1938 described fees as "costs." All are currently in force.

⁷ Clayton Act, 15 U.S.C. § 15 (1914).

⁸ Securities Act of 1933, 15 U.S.C. § 77(e) and Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e) & 78r(a)

⁹ Copyright Act of 1909, 17 U.S.C. § 40. This provision has since been replaced by § 505 of the Copyright Act of 1976, 17 U.S.C. § 505, which uses virtually identical language.

Agricultural Commodities Act, 7 U.S.C. §§ 499g(b) & (c) (1930); the Railway Labor Act, 45 U.S.C. § 153(p) (1926); and the Unfair Competition Act, 15 U.S.C. § 72 (1916).

Most significant, every one of the twelve statutes, allowing attorney's fees awards in 1938, included and defined attorney's fees as part of the "costs." Section 407 of the Communications Act of 1934, 47 U.S.C. § 407, for example, provided, in pertinent part:

If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Section 210(f) of the Packers and Stockyards Act, 7 U.S.C. § 210(f), used the identical language, as did Section 499g(b) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b), and Section 153(p) of the Railway Labor Act, 45 U.S.C. § 153(p). Even more striking, in relation to § 1988 of the Civil Rights Act, was Section 40 of the Copyright Act of 1909, 17 U.S.C. § 40 (1940 ed.), which provided that a court could "award to the prevailing party a reasonable attorney's fee as part of the costs"—language virtually identical to § 1988."

The drafters of Rule 68 could not have been oblivious to these many federal statutory provisions allowing an award of attorney's fees "as part of the costs," which language was subsequently approved by Congress. The drafters must have realized and intended that Rule 68's reference to "costs" would include attorney's fees where Congress had frequently provided that attorney's fees were to be taxed and collected "as part of the costs." Rule 68 was not enacted in a vacuum.

C. ENACTMENT OF THE RIGHT TO ATTORNEY'S FEES UNDER § 1988 ASSUMES THE PROCEDURES OF THE FEDERAL COURTS AS THEN EXISTING.

The passage of § 1988 in 1976 was triggered by this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) requiring Congress, not the courts,

to decide when and if fees should be shifted. Congress came to recognize that individual civil rights litigants would assume the laudable role of "private attorney generals" to vindicate congressional civil rights policies. Private litigation was viewed as a key factor in the enforcement scheme. Senate Report 94-1011, 1976 U.S. Code Cong. & Admin. News 5908. (hereinafter cited as Sen. Rep. 94-1011). The concept of fee shifting, which requires the defendant to pay the prevailing plaintiff's attorney, furthers the policy concept of enforcing fundamental civil rights through the litigation of good faith, meritorious causes of action.

Prior to the *Alyeska* opinion and to the passage of § 1988, the Senate Judiciary Committee in 1973 had held six days of hearings on the legal fees issues before the Subcommittee of the Representation of Citizen Interests. In 1976 the Committee's 1973 proceedings were adopted and published as Sen. Rep. 94-1011. According to the Subcommittee Report, over 30 witnesses testified, including state and federal public officials, scholars, practicing attorneys and private citizens. Written material was submitted by the American Bar Association, the District of Columbia Bar Association and 22 state bar associations. Sen. Rep. 94-1011 at 5909. The Senate Report states: "The purpose and effect of [§ 1988] are simple—it is designed to allow courts to provide the *familiar* remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." Sen. Rep. 94-1011, at 5910. (emphasis added.) The Report further explains: "We have, since 1870, authorized fee shifting under more than 50 laws. . . . In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." Sen. Rep. 94-1011 at 5910.

The legislative enactment of fee shifting was for the purpose of attracting competent counsel to represent civil rights litigants. This purpose has been achieved in the case at bar with the employment of competent, experienced counsel, as demonstrated by the affidavit of respondent's attorney, which

lists his outstanding qualifications. J. A. A-18-22. The legislative purpose was not to produce "windfall" fees to attorneys. As the Senate Report notes: "These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter. [cites omitted]'" Sen. Rep. 94-1011, at 5913. In analysing this congressional purpose, the Tenth Circuit subsequently stated:

The caution against 'windfalls' for attorneys shows that Congress was exclusively interested in making civil rights actions more attractive to prospective plaintiffs. Congress was not trying to get these cases into court by making them lucrative to attorneys. Therefore, an award of attorney's fees which benefits a plaintiff's attorney rather than a plaintiff does not further congressional policy. *Cooper v. Singer*, 689 F. 2d 929, 931 (10th Cir. 1982)¹⁰

The fee shifting provisions were designed to encourage private attorneys in bringing meritorious suits, even though the total damage amount might be small or the relief requested might be injunctive in nature. *Sisco v. J.S. Alberici Const. Co., Inc.*, ____ F. 2d. ____, Slip. Op. 83-1757 (8th Cir. April 24, 1984).

After the extensive hearings held by the Senate and the House Committees, § 1988 was passed with the language that the reasonable attorney's fees would be assessed for the prevailing party "as part of the costs." Congress was not naive in drafting fee shifting statutes. The numerous fee statutes that have preceded or followed § 1988 manifest sophisticated, knowledgeable congressional initiatives in designating fees "as part of the costs" to serve legislative purposes. Numerous statutes utilize similar, and sometimes the same language as § 1988 to define the fees to be shifted "as part of the costs".

¹⁰ This opinion in *Cooper v. Singer* was subsequently reviewed by the Tenth Circuit pursuant to a petition for rehearing *en banc*. The opinion on rehearing is reported in *Cooper v. Singer*, 719 F. 2d 1496 (10th Cir. 1983).

At least sixty-nine federal statutory provisions currently provide for a court award of attorney's fees under the rubric of "costs."¹¹ At least seven of the sixty-nine attorney's fee award provisions define attorney's fees as costs in language identical to § 1988, allowing the court to award "a reasonable attorney's fee as part of the costs."¹² The numbers may be substantially higher.¹³ At least five other statutory provisions among the sixty-nine use language nearly identical to § 1988.¹⁴ The holding in this case will thus have an impact on provisions of the United States Code far beyond § 1988. If the opinion of the

¹¹ The complete text of these 69 statutory provisions is reprinted in Appendix B to this brief.

¹² Statutes allowing an award of "a reasonable attorney's fee as part of the costs" are: the Agricultural Unfair Trade Practices Act, 7 U.S.C. § 2305 (enacted in 1968); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(3)(b) (enacted 1964); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (enacted 1964); the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (as amended in 1980); the Copyright Act of 1976, 17 U.S.C. § 505; the Jury System Improvement Act of 1978, 28 U.S.C. § 1875(d)(2); the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b) (enacted in 1978); and the Voting Rights Act amendments of 1975, 42 U.S.C. § 1973(1)(c). Except for the Copyright Act of 1976 and the Jury System Improvement Act of 1978, all of the statutes just listed also mimic 42 U.S.C. § 1988 by providing that the court "in its discretion" may make the award to the "prevailing party."

¹³ The *amicus* brief of the Solicitor General identifies 142 federal attorney fee statutes and reports that fees are described as part of "costs" in 92 of them.

¹⁴ The five statutes using language similar to § 1988 are found in the Communications Act of 1934, 47 U.S.C. § 206 ("attorney's fees shall be taxed and collected as part of the costs in the case") and 47 U.S.C. § 407 ("If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit"); the Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b) ("If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit"); and the Securities Act of 1933, 15 U.S.C. § 77k(e) (court may, in its discretion, award costs of suit, including a reasonable attorney's fee, "such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard".)

court of appeals is affirmed, a valid Rule 68 offer will provide no incentive for the offeree to settle in any case brought under one of the sixty-nine attorney's fees award statutes. Each statute under the Seventh Circuit analysis would be "substantive", foreclosing the use of Rule 68 which is "procedural". On the other hand, under any of the 69 statutes, if "costs" in Rule 68 are defined to exclude attorney's fees, then the offeree will almost always disregard Rule 68. He will do so, because he will be able to finance any award of costs made against him under Rule 68 (should the offeree fail to finally obtain a judgment more favorable than the offer) out of the attorney's fees award which he will receive so long as he is the "prevailing party".

The impact which an affirmance here could have on litigation in the federal courts can be roughly quantified. Over 20% of all civil cases commenced in the United States district courts during the twelve month period ended June 30, 1983 potentially involved awards of attorney's fees as part of the costs under § 1988 or some other federal statute. *Annual Report of the Director of the Administrative Office of the United States Courts* 122-123 (1983) (hereinafter "1983 *Annual Report*").¹⁵ Since the Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature," Fed. R. Civ. P. 1, it is clear that Rule 68 may play

¹⁵ A chart on page 123 of the 1983 *Annual Report* gives the following breakdown for civil cases commenced in federal district courts during the 12 month period ended June 30, 1983: State prisoner petitions, 10.9%; federal prisoner petitioners, 1.8%; civil rights cases, 8.2%; and antitrust cases, 0.5%—all of which add up to a total of 21.4% of the 241,842 civil cases filed in federal district courts during that period. This amounts to approximately 51,750 cases covered by either 42 U.S.C. § 1988 or by the Clayton Act, 15 U.S.C. § 15. A more detailed listing on page 122 of the 1983 *Annual Report* (Table 18) shows that an additional 19,361 cases were brought during the same 12 month period under federal labor laws (11,033 suits) patent, copyright, and trademark laws (5,413 suits), and securities commodities, and exchange laws (2,915 suits), many of which were undoubtedly brought under federal statutes allowing an award of attorney's fees to a prevailing party.

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a part in all civil cases covered by statutes that award attorney's fees as part of the costs. Even if this Court's opinion on Rule 68 in the instant case were to apply only to § 1988 cases, that opinion can have a positive effect on overloaded federal trial court calendars.

What is patently apparent in § 1988's congressional history is the existence of obvious concern that these many thousands of civil cases do not become a vehicle for attorneys to subsidize a law practice with "harassing litigation and its potential for intimidation of defendants." *Pulliam v. Allen*, ____ U.S. ____, 52 U.S.L.W. 4525 (1984) (Powell J., dissenting). The "lure of substantial fees", which can easily become the single largest expense of the litigation,¹⁶ was not countenanced by Congress with the enactment of § 1988. *Id.* at 4535. Sen. Rep. 94-1011, at 5913. However, in the courthouse the "lure of substantial fees" on marginal civil rights cases has now begun to clog dockets and undercut both the general litigants' and the public's "overriding" interest "in settlement rather than the exhaustion of protracted court proceedings". *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 (1980) (Powell, J. con-

Footnote continued from preceding page.

Moreover, since 42 U.S.C. § 1988 applies not only to suits alleging constitutional violations but also to suits alleging violations of the statutes or laws" of the United States, *Maine v. Thiboutot*, 448 U.S.C. 1 (1980), there are probably thousands of additional suits in which the prevailing party is eligible for attorney's fees under § 1988 but which cannot be broken out of the statistics in the 1983 *Annual Report*. The same may be true of federal cases lumped together in the 1983 *Annual Report* under the heading of "Other Statutory," accounting for 9.9% of civil cases filed in federal district courts during the 12 months ended June 30, 1983.

Reading all of these statistics together, it is estimated that upwards of one-third of all federal civil cases are covered by federal statutory provisions authorizing an award of attorney's fees to the prevailing party as part of the "costs."

¹⁶ See, Note, The Impact of Proposed Rule 68 on Civil Rights Litigation, 84 Column L. Rev. 719 (1984).

Footnote continued on following page.

curing). The exacerbation of the problem by the holding in the case at bar is caused by the guarantee of a post-offer fee, irrespective of whether, in practical terms, plaintiff wins or loses.

A solution appears beyond reach under the decisional law of the Seventh Circuit. For example, in *Skoda v. Fontani*, 519 F. Supp. 309 (N.D. Ill. 1981) a jury awarded the plaintiffs \$1.00 each as civil rights damages. The district court then ruled that an award of attorney's fees and costs should be denied. The court saw the verdict to be a "special circumstance" under *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), especially since the only circumstance hindering a pre-trial settlement had been the attorney's fees demand of plaintiff's counsel. In reversing the trial court the opinion in the Seventh Circuit held that, since the plaintiffs were prevailing parties under 42 U.S.C. § 1988, the district court had to award attorney's fees.¹⁷ *Skoda v. Fontani*, 646 F. 2d 1193 (7th Cir. 1981). Obedient to instruction, on remand, District Court Judge Marvin Aspen reluctantly awarded the plaintiff's attorney the sum of \$6,086.12, including attorney's fees and costs. Judge Aspen sagely commented "...it is doubtful that Congress envisioned that § 1988 would become the catalyst for litigating a claim which otherwise would be settled." *Skoda v. Fontani*,

Footnote continued from preceding page.

In *Chesny v. Marek*, 720 F. 2d 474 (7th Cir. 1983), the respondent has now claimed post-offer of judgment fees of approximately \$250,000, through the appeal, in addition to the previously paid \$32,000 for pre-offer of judgment fees. The respondent, if he prevails, would thus receive about \$282,000 in fees in a case the jury found to be worth only \$60,000.

¹⁷ The Seventh Circuit has evolved other judicial pronouncements on the basis of \$1.00 verdicts. In *Pigeaud v. McLaren*, 699 F. 2d 401 (7th Cir. 1983), it was held that a plaintiff who accepted a \$1.00 offer of judgment that did not include attorney's fees, was *not* a prevailing party under § 1988. As the plaintiff had attained no success on the merits, he could not claim fees under § 1988. Further, the Seventh Circuit held that no fee could be awarded under Rule 68 if the offer had not included attorney's fees, which the defendants had not offered in *Pigeaud*.

519 F. Supp. 309, 310 (N.D. Ill. 1981). Because of the *Skoda* and *Chesny* opinions, both the "special circumstances" and the "offer of judgment" exceptions to the draconian force of § 1988 are now foreclosed in the Seventh Circuit. In consequence, the petitioners in the case at bar are exposed to almost a quarter million dollars in attorney's fee with no recourse. Only this Court can prevent this result from happening.

D. REVERSAL OF THE COURT BELOW WILL REMOVE PETITIONERS FROM UNWARRANTED JEOPARDY AND PRESERVE THE HARMONY BETWEEN SEC. 1988 AND RULE 68.

An offer of judgment which includes attorney's fees can terminate otherwise protracted litigation, such as the instant case, and force the plaintiff's attorney to look at his "hole card", before either proceeding to trial or settling. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 380 (1981) (Rehnquist, J. dissenting). Rule 68 can be an effective method of dispute resolution in civil rights cases, if it receives this Court's imprimatur. The increasing use of Rule 68 signals recognition of its potential usefulness in this era of national litigiousness. Footnote 15, *Supra*. Respectfully, rejection of Rule 68 here could be its death knell with no feasible alternative currently available.¹⁸

In the case at bar, the Seventh Circuit has chosen to devastate the one effective procedural method defendants have available in civil rights cases to resolve litigation fairly. Ignoring the express language of § 1988, the Seventh Circuit's opinion seems oblivious of the rectitude of petitioners' offer of judgment which exceeded the sum of the verdict and fees respondent and his attorney have now accepted and spent. The *ratio decendi* of the opinion here on review is the appellate court's expressed view of public policy. This view places petitioners in serious jeopardy but produces no concomitant public benefit.

¹⁸ Petitioners presume that consideration of the proposed new Rule 68 has been shelved at this time.

The Seventh Circuit's opinion provides plaintiff's civil rights attorneys with an impetus to dishonor the policy behind § 1988 as well as the policy behind the Federal Rules of Civil Procedure, particularly Rule 68. Without the inclusion of attorney's fees in "costs", the plaintiff's attorney will be subjected to a temptation he may not be able to resist. When a valid Rule 68 offer is made, even if realistic and acceptable to the plaintiff, his counsel is tempted to reject it. The attorney may protract the litigation and ignore a Rule 68 offer to increase his billable time. If he does so under the law in the Seventh Circuit, he will then be paid by the defendant even though he might only win \$1.00 at trial. If this hypothetical attorney perceives even a remote possibility of recovering a verdict, although it would be less than the offer of judgment, he will keep the meter of billable time running. When the meter finally runs out, he can petition for a very large fee. This hypothetical plaintiff's attorney has little, if any, incentive to even consider the Rule 68 offer of judgment, even though valid. It is the view expressed in the Seventh Circuit's opinion that the only repercussion to a plaintiff who fails to accept a reasonable offer is the obligation to pay nominal deposition costs, postage, telephone and photocopy charges, incurred after the date of the offer of judgment. In the trial courts, those "costs" are insignificant when compared with the amount of the attorney's fees accrued during trial, even at reasonable hourly rates. The threat of having to absorb these insignificant "costs" is not sufficient incentive to settle cases. Note, *Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation of the Scope and Purpose of Rule 68*, 16 Ga. L. Rev. 482 (1982). By extinguishing Rule 68 as a vigorous procedural rule, the Seventh Circuit opinion chooses to compensate those attorneys who have erred in assessing the merits of their case and who may, instead, have chosen to keep the clock running, rather than "secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1.¹⁹

¹⁹ Petitioners do not imply criticism of the conduct of respondent's attorney in the case at bar and believe that conduct was of the appropriate ethical and professional standards.

When a defendant in a civil rights case makes a valid offer of judgment, which includes attorney's fees, the defendant is not only complying with an important public policy of settling otherwise protracted litigation, but he is also complying fully with congressional policies underlying the Civil Rights Acts generally and § 1988 particularly. In the first instance, the offer of judgment by its very terms immediately elevates the plaintiff to the status of a prevailing party. The defendant is allowing "judgment to be taken against him for the money . . . specified in his offer, with costs then accrued." Fed. R. Civ. P. 68. Prior to the offer being conveyed to the plaintiff, the plaintiff has merely a possibility, but no assurance of winning "... for seldom can a prospective plaintiff be sure of ultimate success." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). But when an offer of judgment is accepted, the offer of judgment has elevated the plaintiff to the posture of a "prevailing party". 42 U.S.C. § 1988. Once the defendant makes the plaintiff a prevailing party, the offer of "money or property or . . . effect specified in [the defendant's] offer, with costs then accrued . . ." should then vindicate the plaintiff's alleged civil rights violation and compensate the plaintiff's attorney. Fed. R. Civ. P. 68.

Careful reflection suggests that an offer of judgment should include the attorney's fees as "costs". *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978). The defendant should receive a benefit commensurate with his burden in making an offer of fees. The defendant making an offer of judgment not only must forecast the reasonable value of the plaintiff's case on the merits, but must also calculate the approximate "costs", including fees, incurred by his opponent to the date of the offer of judgment. If the attorney for the defendant misjudges in this difficult effort, he exposes his client to the full liability of all attorney's fees of the prevailing plaintiff after a trial. To protect a defendant from post-offer fees would be just, after he carries this burden successfully.

If this Court were to reverse the Seventh Circuit, petitioners respectfully submit that unreasonably or ridiculously low Rule 68 offers would produce no threat to the Civil Rights Act. A low offer in practice will have the same effect as no offer, if the "costs" with attorney's fees are included in a Rule 68 offer. In the case of a low offer, plaintiff's "judgment finally obtained" with fees and costs can be expected to exceed the defendant's offer. Fees and costs will be awarded plaintiff under § 1988 as "prevailing party". To create an example from the facts of *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), if the defendant makes a small, \$450 offer, even the sum of the attorney's fees plaintiff will have incurred before filing the complaint plus the filing fee for the complaint, will probably approach or exceed the \$450 offered. In making such an offer, the defendant should know his offer is too low to merit consideration by the plaintiff and will be rejected. When plaintiff recovers even a nominal sum, such as \$100, the defendant's \$450 offer of judgment will not foreclose a fee award to the prevailing plaintiff. The plaintiff can confidently reject a frivolous offer, knowing that the defendant is still obligated to pay his attorney's fees through the completion of the case, because when the plaintiff prevails with a minimal judgment amount plus pre-offer fees he will exceed the Rule 68 offer. Plaintiff's civil rights will be vindicated and the policy of § 1988 will remain secure. If the amount of the pre-offer fees is contested, the court can resolve the issue as to amount and then determine whether the result is more favorable than the Rule 68 offer.

The Seventh Circuit retreated from the holding here suggested in part because of its concern with the Rules Enabling Act, 28 U.S.C. § 2072. After some expressed uncertainty, the Seventh Circuit opinion finally concludes that § 1988 attorney's fees are a "substantive", rather than "procedural" and cannot be abridged by Rule 68. A simple demonstration of this "substantive/procedural" theory in operation will show its flaw.

Assume that a defendant is awarded attorney's fees under Rule 37 (sanctions on motion to compel discovery) or Rule 11 (attorney's representations of good faith action by signing pleading) but that subsequently the civil rights plaintiff prevails at trial. When it comes time to pay Rule 11 or 37 fees to defendant, plaintiff's award of attorney's fees could not be reduced by the amount he owes the defendant, because plaintiff's "substantive" right to fees cannot be jeopardized or diminished by any Federal Rule of Civil Procedure. This would be the logic of the "substantive/procedural" theory. But a district court cannot be denied all discretion to set off fees due the defendant without dismantling Rule 11 or 37. Clearly, procedures can, and must impinge on "substantive" rights. So long as the "substantive" right is duly honored, it can be effected by procedure in accord with the Rules Enabling Act. 28 U.S.C. § 2072.

Although not overtly expressed in the opinion, the Seventh Circuit seems to be concerned over the possible chilling effect that the district court's ruling would have on civil rights cases. The Circuit Court suggests a dilemma of forcing plaintiff's civil rights attorneys "to think very hard before rejecting [an offer of judgment] even if they consider it inadequate, knowing that rejection could cost themselves or their client a lot if it turned out to be a mistake" is too burdensome for plaintiff's civil rights attorneys, according to the opinion below. *Chesny v. Marek*, 720 F. 2d 474, 479 (7th Cir. 1983). The argument would be that plaintiff's civil rights attorneys will hesitate to undertake litigation, if their fees will be curtailed upon failing to beat an offer of judgment by even a few dollars. Petitioners do not believe this argument is true or persuasive. But if the assumption is correct, the answer to it is twofold. First, the plaintiff's attorney has seriously misjudged the case, if he leaves no margin for error in assessing the offer of judgment. Clearly an offer of judgment which includes attorney's fees and proves to be only a few dollars over the verdict plus fees is an offer based on a solid, accurate evaluation of the case. It makes the

plaintiff whole and compensates his attorney. For the plaintiff's attorney to reject such an offer suggests that the attorney is either gambling needlessly or is unable to evaluate his case.

Petitioner's second response to the Circuit Court's dilemma consists of a principle respectfully submitted for this Court's consideration: the Federal Rules of Civil Procedure should apply without exception to all litigants, not just some. Consistent with this principle, Rule 1 mandates uniform application of the Rules to "all suits of a civil nature" Fed. R. Civ. P. 1.²⁰ Truncating a federal procedural rule, as the Circuit Court has done, leaves the overburdened trial courts with little, if any, guide to whether that rule is inapplicable to some cases but is applicable to others.

Unless attorneys are forced to abide by the Federal Rules of Civil Procedure by "thinking very hard" about the fair settlement of their cases, civil rights cases will be litigated for the sake of fees, not the vindication of civil rights. If the denial of post-offer fees to an attorney, who receives less on verdict than the offer, can be labeled unfair, it is an unfairness present in any lawsuit where there is a winner and loser. We should remember that the defendant also is running a risk of a verdict for plaintiff which exceeds the offer by even a few dollars. The defendant then must pay all fees of plaintiff's attorney. All litigants should be bound by § 1988 which Congress has enacted with an express definition of attorney's fees "as part of the costs."

The courthouse is still open to any individual who chooses to bring a civil rights lawsuit for the vindication of his or her rights. Competent legal counsel will still be attracted to civil rights cases by the assurance that their attorney's fees will be included as part of an offer of judgment, whether it be by settlement or verdict. As this Court notes in *Owen v. City of*

²⁰ Rule 81 has exceptions to Rule 1, but Rule 81 does not exempt any civil rights case from coverage of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 81.

Independence, 445 U.S. 622, 654 (1980), "elemental notions of fairness dictate that one who causes a loss should bear the loss." It follows that the plaintiff's attorney who misjudges and unreasonably protracts litigation causes a loss to his client. Accordingly he should bear the loss of his fees, if he has refused a more favorable offer of under Rule 68.

E. NUMEROUS CIRCUIT COURTS AND DISTRICT COURTS THROUGHOUT THE UNITED STATES HAVE APPLIED RULE 68 IN A HARMONIOUS AND LEGALLY SOUND MANNER TO CIVIL RIGHTS CASES.

In deciding *Chesny v. Marek*, 720 F. 2d 474 (7th Cir. 1983) the Seventh Circuit held that a valid Rule 68 offer can include attorney's fees. The petitioners, according to the Seventh Circuit, have made a valid offer: the verdict of \$60,000 plus the accrued pre-offer costs and attorney's fees of \$32,000 was in sum less than the offer of \$100,000.

After finding that all prerequisites to a valid offer have been met by the petitioners' offer of judgment, the Seventh Circuit concludes that this valid offer of judgment should not defeat the congressional policy of awarding all fees to a prevailing party, regardless of the Federal Rules of Civil Procedure. In so holding, the opinion asserts a belief that Rule 68 is inappropriate in a civil rights context because it is "little known and little used." *Chesny v. Marek*, 720 F. 2d 474, 475, 479 (7th Cir. 1983).

This conclusion and the opinion of which it is a part ignores a substantial body of case law which has developed during the past fifteen years and which has addressed the issue of Rule 68's impact in a variety of fee shifting contexts. The opinion is silent about contrary conclusions reached by several district courts. Further, the opinion would distinguish the case at bar from the denial of § 1988 fees in the Sixth Circuit to a plaintiff by operation of a Rule 68 offer of judgment. *Fulps v. City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983).

First, in examining early district court cases, two cases which discuss Rule 68, do not lend support to an argument that attorney's fees are not part of "costs" in this case. In *Gamlen Chemical Co. v. Dacar Chemical Products Co.*, 5 F.R.D. 215 (W.D. Pa. 1946), plaintiff had accepted an offer of judgment which did not mention attorney's fees, in a copyright infringement case and then applied to the court for fees. The court held that the fees must be specifically mentioned in the offer of judgment. Next, *Cruz v. Pacific American Insurance Corp.*, 337 F. 2d 746 (9th Cir. 1964) held that under the Guam offer of compromise statute, Guam Code Civ. P. § 997, the defendant need not pay attorney's fees as part of the costs, if defendant had not agreed to do so in the offer. *Cruz* is not precedent in an analysis of Rule 68 at this time. The Guam statute, while similar to Rule 68 in language, does not require that the offer include costs then accrued. More recently, in *Waters v. Heublein, Inc.*, 435 F. Supp. 110 (N.D. Cal. 1979), the district court rejected the Ninth Circuit's rationale in *Cruz* as not controlling, even though the district court is bound by Ninth Circuit decisions. See, *Chesny v. Marek*, 547 F. Supp. 542, 546 n. 3 (N.D. Ill. 1982).

After the passage of § 1988 in 1976, district courts were increasingly faced with Rule 68's impact on the new legislation. In 1978, the Colorado district court held in *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978), that if an offer of judgment excludes attorney's fees as part of the costs, the offer of judgment is invalid. In following *Scheriff v. Beck*, the Northern District of California held in *Waters v. Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979) that an offer of judgment for costs then accrued should include attorney's fees. Further, the court held that if the judgment finally obtained does not exceed the offer, Rule 68 will bar the recovery of the fees after the date of the offer. The rationale of the court in *Waters v. Heublein* is persuasive:

Rule 68 is designed to prevent needless litigation by punishing a party that chooses to reject a reasonable settlement offer. Awarding fees covering their pre-offer work to attorneys who settle cases through acceptance of an offer of judgment advances the purposes underlying the fees provision. On the other hand, applying Rule 68 to bar the recovery of post-offer fees in a case in which a party has rejected a reasonable offer that ultimately exceeds the judgment does not unduly interfere with the operation of this provision. Since the pre-offer efforts of the attorney reached a result more favorable to the client than the verdict, there seems little reason to reward that attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits. Thus, this application of the Rule should work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation. *Id.* at 114-5.

While discounting Rule 68 offers of judgment, the Circuit Court in *Chesny v. Marek*, amazingly never mentions *Waters v. Heublein*, even though the district court opinion it reverses extensively discusses *Waters* as persuasive authority.

The Seventh Circuit opinion ultimately seems to rely on this Court's holding in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). In *Roadway Express*, this Court held that in the context of 28 U.S.C. § 1927, attorney's fees would not be included as part of the costs in a civil rights case where the plaintiff's attorney had "so multiplied the proceedings in any case as to increase costs unreasonably and vexatiously". 28 U.S.C. § 1927. The opinion below makes the quantum leap to conclude: "No more should 'costs' in Rule 68 be read to include attorney's fees in such a case." *Chesny v. Marek*, 720 F. 2d 474, 480 (7th Cir. 1983). In so holding, the Circuit Court not only misapplies the holding of *Roadway Express*, but also misses this Court's reasoning in *Hutto v. Finney*, 437 U.S. 678 (1978) and the statements of Justice Powell in *Delta Air Lines, Inc. v. August*, 450 U.S. 347 (1980) (Powell, J. concurring).

In *Roadway Express*, this Court was called upon to construe "costs" in § 1927 in conjunction with its companion section, § 1920. 28 U.S.C. § 1920 specifies with particularity, without mentioning attorney's fees, those costs which are ordinarily taxed to a losing litigant, such as marshal's fees, witness fees, copying costs, printing and court reporter costs. Since the Act itself defines the "costs" in § 1920, the Court had no reason to look beyond the Act for a definition of the costs which would include attorney's fees. This Court noted that the concept of punishing attorneys who multiply proceedings needlessly first appeared in 1813. The Act of February 26, 1853, 10 Stat. 161 later coupled the definition of costs (now found in § 1920) with the award of costs against attorneys who vexatiously multiply proceedings (now found in § 1927). Thus, this Court concludes that the sections must be read together, because of their history. The Circuit Court opinion in discussing *Roadway Express* glosses over the important distinction between the Federal Rules of Civil Procedure, which do not define costs, and § 1920, which does. In doing so, it fails to account for Justice Powell's concurring opinion in *Delta Air Lines v. August*, 450 U.S. 347, 364, n. 2 (1980) which interprets the Court's *Roadway Express* holding.²¹ In *Delta Air Lines*, Justice Powell comments that attorney's fees are part of the costs in a Rule 68 offer of judgment situation and that the *Roadway Express* opinion is not contrary to his conclusion. In distinguishing §§ 1920 and 1927 from the Federal Rules of Civil Procedure, Justice Powell states: "In approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation." *Id.* at 364, n. 2.

In *Hutto v. Finney*, 437 U.S. 678 (1977), this Court notes the substantial number of "statutory and common-law situations in which allowable costs include counsel fees." *Id.* at 697. In holding that the Eleventh Amendment does not preclude the award of attorney's fees as part of the costs under § 1988 against a state official, the Court found that:

²¹ Justice Powell is the author of the *Roadway Express* opinion.

It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity. *Id.* at 698.

In § 1988, Congress has clearly chosen to authorize this "litigation cost," within the context of the Federal Rules of Civil Procedure. It is unsupportable to contend, as the Seventh Circuit does, that a contemporaneous understanding of costs in 1938 did not include attorney's fees, when Rule 68 was enacted. Statutes in existence when Rule 68 was enacted did include attorney's fees as costs. Appendix A to this brief is a compilation of some of those statutes. The Seventh Circuit offers no justification to single out attorney's fees as the one kind of litigation cost exempt from the operation of Rule 68.

When Congress decided to enact a statute using the word "costs" to define attorney's fees, it drew upon two centuries of experience in drafting such language. See, Footnote 22 *infra*. Congress had 40 years, between the passage of Rule 68 and § 1988, to learn of this Federal Rule of Civil Procedure. To assume, as the Seventh Circuit does, that knowledge of Rule 68's language had not percolated into congressional awareness by 1976 would be, at best, implausible, if not frightening.

In a factually identical case to *Chesny v. Marek*, Judge Cannella of the Southern District of New York in *Lyons v. Cunningham* ____ F. Supp. ____, 79 Civ. 3953 (S.D. N.Y. Oct. 19, 1983, opinion to be published) has held that Rule 68 precludes the plaintiffs' recovery of attorney's fees, after rejection of an offer of judgment with a subsequent verdict less than the offer. Judge Cannella's comments are noteworthy. In citing *Hutto v. Finney* for the proposition that attorney's fees are an element of the costs and *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 168 (1927) for the proposition that courts have authority to award attorney's fees to further the administration of justice, Judge Cannella sees the distinctions between attorney's fees and costs not to be particularly significant, either

historically or currently under § 1988.²² *Lyons v. Cunningham*, pp. 18-19. In light of the express language of the Sen. Rep., 94-1011, this blurring of the distinctions between costs and fees by the inclusion of attorney's fees as one element of the costs is understandable. In setting out congressional intent for § 1988, the Senate Report 94-1011 at 5913 states:

[D]efendants in these cases are often state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is named party.) (Emphasis added). (Footnotes omitted).

This stated legislative intent patently demonstrates that Congress intended these fees to be governed as if they were costs within the context and ambit of the Federal Rules of Civil Procedure.

In employing the same analysis, the Sixth Circuit Court of Appeal has rendered a decision actually contrary to that in *Chesny v. Marek*. *Fulps v. City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983). In *Fulps*, the Sixth Circuit found that attorney's fees were clearly part of the costs under § 1988 in a case where an offer of judgment had been accepted. The judgment entered by the clerk recited the settlement amount of \$2,500 for each of the two plaintiffs, "plus cost accrued to date of judgment." The plaintiff's attorney subsequently petitioned

²² Coupling attorney's fees as an element of the costs is a well-established and frequently exercised congressional activity. On March 1, 1793, Congress passed an Act since expired, that stated: "Sec. 4. And be it further enacted, That there be allowed and taxed in the supreme, circuit and district courts of the United States, in favour [sic] of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attornies [sic] and counselors' fees, except in the district courts in cases of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states. 1 Stat. 419 (1793)

the district court for an award of his attorney's fees, arguing that the fees had not been included in the \$5,000 total sum indicated in the offer of judgment. The plaintiff contended that the offer should be read as an offer to pay \$5,000 plus costs plus attorney's fees. The defendant City of Springfield argued that they were only responsible for the § 1920 costs and not attorney's fees.

The Sixth Circuit held that "costs" as specified in Rule 68 must include attorney's fees "where the fees are authorized by the substantive statute at issue in the litigation." *Id.* at 1095. Relying on the language of *Hutto v. Finney* and finding that *Roadway Express v. Piper* was not inopposite to their holding, the Sixth Circuit concluded that "Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs." *Id.* at 1093.

The opinion in the Seventh Circuit appears to reject *Fulps*. However, the Sixth Circuit did not rule as the Seventh Circuit suggests it had that Rule 68 "can be used to abrogate the right to attorney's fees that a plaintiff would otherwise have by virtue of § 1988." *Chesny v. Marek* at 480. The use of the term "abrogate" causes the point to be missed. The plaintiff's attorney receives all amounts due to him prior to the offer of judgment and thus there is no "abrogation". By refusing to follow the *Fulps* judicial definition of costs to include fees causes the court below to skirt the issue: Should post-offer fees be denied by operation of Rule 68?

In following the *Fulps* decision, a district court opinion in Connecticut has held that a Rule 68 offer of judgment will preclude the award of post-offer attorney's fees to the plaintiff's attorney, when he fails to recover more on verdict than the offer. *Bitsouni v. Sheraton Hartford Corp.*, 33 F.E.P. Cases 898 (D. Conn. 1983). While concerned that the plaintiff not be saddled with the obligation to pay the defendant's attorney's

fees, if the amount is not bettered by trial, the *Bitsouni* court had no trouble at all reaching the conclusion that the plaintiff's cost under Rule 68 will include his attorney's fees.

Another district court has strongly encouraged the idea of defendants submitting offers of judgment in order to toll the amounts civil rights plaintiffs could recover in fees after of the offer. *Neal v. Berman*, 576 F. Supp. 1250 (E.D. Mich. 1983). In *Neal*, the defendants had orally offered to settle the case. Defendant never put its settlement offer in writing. Plaintiff "prevailed" with a verdict amount which the defendants would have been willing to pay. In concluding that the time spent by the plaintiff's attorney at trial was unnecessary, the district court observed that the plaintiff would be denied fees for post-offer work, but for the fact that defendants had not submitted a formal, written settlement offer. *See also, Spero v. Abbott Laboratories*, 396 F. Supp. 321 (N.D. Ill. 1975).

II. WHEN THE TRIAL COURT DETERMINES THE AMOUNT TO BE AWARDED UNDER § 1988, IT SHOULD AWARD ONLY THAT PORTION OF A REASONABLE ATTORNEY'S FEE AMOUNT WHICH IS IN EXCESS OF THE AMOUNT THE PLAINTIFF HAS PAID HIS ATTORNEY UNDER AN ATTORNEY'S FEE CONTRACT.

Petitioners have argued in Point I of this brief in support of the district court opinion that by operation of Rule 68 no further fees at all are due respondent's attorney for his post-offer of judgment work. If petitioners' and the district court's view presented here is rejected, this case should be remanded for a determination of what, if any, fees additional to those already paid are appropriate. It is respectfully submitted that the district court on remand should scrutinize the previously undisclosed contingent fee agreement for fairness to determine what is a reasonable fee. Because respondent had not disclosed his fee agreement in the district court, that court had no occasion to consider the contingent fee which is already paid.

The contingent fee was paid under an agreement in this case which was not disclosed by respondent when the complaint was filed. J.A. A-46. As revealed during the appellate phase of this case, the terms of that contingent fee agreement provide a division between respondent and his attorney of "all amounts recovered". J.A. A-51. Respondent has treated the meaning of that phrase in the contract to include fees under § 1988 with 55% of the fee being paid to respondent and 45% being paid to his attorney. J.A. A-51. The pre-offer of judgment fees and costs here recoverable by § 1988 are established at \$32,000.²³

The respondent's attorney acknowledges that he retained 45% of the \$32,000 paid by petitioner as fees, as well as 45% of the \$60,000 paid by petitioners in satisfaction of judgment on verdict (J.A. A-52). The resulting sum in total is \$41,400 in attorney's fees received. J.A. A-48. It was approximately one year after receiving these fees that respondent's attorney first admitted (in response to a question from the court during oral argument on appeal) that a contingent fee agreement did, in fact, exist. Pet. A. A-6.

Petitioners advocate that respondent's fully executed contingent fee contract be honored, not abolished. While district courts may review the reasonableness of a fee agreement, an attorney and a client nevertheless have a right to execute contingent fee agreements. *Rosquist v. SooLine Railroad*, 692 F. 2d 1107 (7th Cir. 1982); *Krause v. Rhode*, 640 F. 2d 214 (9th Cir. 1981); *Sargeant v. Sharp*, 579 F. 2d 645 (1st Cir. 1978). Petitioners submit that a frustration of the district court's review of the fee contract by non-disclosure of its existence defeats justice. Contingent fee contracts to the extent they establish a "reasonable attorney's fee" under § 1988 prevent a windfall profit being paid to a prevailing plaintiff's attorney.

²³ Respondent's attorney and petitioners' attorney agreed to reduce respondent's fee demand from \$34,392.35 to \$32,000, although respondent continued to request a multiplier to this lodestar amount. Judge Shadur denied the multiplier. J.A. A-24-25.

In asserting the existence of a congressional policy of disfavor for unjust enrichment of respondent's attorney, petitioners cite as authority Sen. Rep. 94-1011. That Senate record establishes the congressional goal of attracting and compensating competent attorneys in civil rights cases. The Senate Report admonishes that "windfall" fees should not be awarded to counsel. Sen. Rep. 94-1011 at 5908. Civil rights attorneys are expected by Congress and the courts to advocate against civil rights violations. But Congress does not intend that attorney's launch their own private, capital ventures under the guise of § 1988. *Brown v. Stackler*, 612 F. 2d 1057 (7th Cir. 1980).

This Court has now established in *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983) that the § 1988 fee award must be reasonable. This Court has stated that "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 1940. By their very nature, contingent fees are inexorably linked to "relief obtained" in behalf of the client. In calculating the reasonableness of a fee, it is not surprising to learn that one of the factors which should be considered by district courts is the contingent fee agreement between the prevailing plaintiff and his attorney. *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974). Some circuits have even gone so far as to hold that compensation paid to attorneys through a percentage of judgment on verdict is a basis sufficient to deny § 1988 fees. See, *Buxton v. Patel*, 595 F. 2d 1182 (9th Cir. 1979); *Zarcone v. Perry*, 581 F. 2d 1039 (2d Cir. 1978); *contra*, *Cooper v. Singer*, 719 F. 2d 1496 (10th Cir. 1983).

In the case at bar, respondent's attorney has been awarded by the district court \$32,000 as his § 1988 reasonable, pre-offer of judgment fee. However, he has actually been paid by his

client \$41,400 to date.²⁴ In calculating the reasonableness of this amount in the face of the contingent fee, the jury verdict in this case warrants analysis. An itemized verdict was reached in this case. (R. 119). The jury found that the civil rights violation standing alone justified a verdict of \$52,000. Punitive damages of \$1,000 under analogy to a common law tort cause were assessed against each of the three police officers. Compensatory damages of \$5,000 under analogy to the Illinois Wrongful Death Act were assessed. Thus, it could be realistically argued that, the "pure" § 1983 cause of action, i.e. "violation of civil rights", produced for the respondent by judgement on verdict \$52,000 (or \$60,000, if the offer of judgment had been accepted²⁵).

It cost \$32,000 in pre-offer fees to obtain that \$52,000. The contingent fee paid cannot be disregarded in measuring a reasonable fee under § 1988. The wrongful death cause at \$5,000, and the punitive cause at \$3,000, on a 45% contingent fee basis cost \$3,600 to produce. While these latter two actions were prosecuted under § 1983, they were cognizable under state law where common law tort actions have always been a means to vindicate individual rights. The \$32,000 statutory fee looked at in conjunction with the 45% contingent fee should demonstrate that reasonableness in awarding § 1988 fees mandates factoring the contingent fees paid into the trial court's decision.

Contingent fee payments under this analysis can operate as a limitation on fees awards under § 1988. This limitation would depend on how successful in a monetary sense a plaintiff is.

²⁴ Respondent had asked the jury for \$3,500,000 in damages. Had the verdict followed respondent's request, respondent's attorney would have recovered \$1,575,000 in fees (45% of \$3,500,000). It would seem only equitable that any sum previously recovered under such contingent fees contracts must be disclosed by plaintiff and then be factored in by the district court in deciding fees under the *Johnson* and *Hensley* guidelines.

²⁵ The \$100,000 offer minus the \$8,000 for death and punitive damages and minus the \$32,000 fee leaves \$60,000 for the civil rights violation.

The success factor has been recognized in *Hensley v. Eckerhart*. In the case at bar the result cannot be claimed to be "excellent". Excellent results may justify full, compensatory fees. Conversely, under *Hensley*, limited achievement justifies reductions in fees. Especially here, since the "success" of respondent is partial at best in the face of a \$100,000 offer of judgment made long before trial, the attorney's fees received under the contingent fee agreement should cause the district court to limit or reduce any additional fees which otherwise might be awarded now. The amount of that reduction should be established by the trial court's sound discretion. Respondent's attorney has been awarded to date \$32,000 as § 1988 attorney's fees. He credited 55% of that sum to his client. Nevertheless, he is also entitled to 45% (\$27,000) from the \$60,000 verdict, because of the terms of the contingent fee contract. The contract, respondent attorney has asserted, provides that he and his client (not a lawyer) split "all amounts recovered", including attorney's fees, on a 45%/55% basis, and that is what they have done (J.A. 52). A fee agreement in a civil rights case should expressly deal with fees under § 1988 and the impact of the award on the agreement. The opinion in *Cooper v. Singer*, 710 F. 2d 1496 (10th Cir. 1983) by use of sound reasoning has held this to be the law. Since the instant fee contract is silent about § 1988 fees, the district court must decide any additional § 1988 fees in light of fees already paid to respondent's attorneys under the contingent fee agreement.

The fee issue on this contingent agreement is not a question of prospective payments. There has been a \$27,000 payment to respondent subject to the attorney's fee (as part of the payment of the \$60,000 judgment). It was earmarked for attorney's fees because of the contingent fee contract. Petitioners submit that the \$27,000 paid and available to respondent's lawyer as attorney's fees can only be a windfall profit, when stacked on top of the \$32,000 paid in § 1988 fees by petitioners. The sum of these two amounts is \$59,000, and every penny of it came from petitioners. The fact that the respondent's attorney only

took \$41,400 and credited the balance of the \$59,000 to his client does not justify an assessment against petitioners of an additional fee award over and above the \$59,000 which already has been funded by petitioners. The contingent fee contract should be a factor used in arriving at a reasonable fee award and this should be done in a manner consistent with the policy of § 1988 as defined by *Hensley v. Eckerhart*, ____ U.S. ____, 103, S. Ct. 1933 (1983).

CONCLUSION

The petitioners respectfully request affirmance of the district court and reversal of the circuit court in the award of costs including attorney's fees under 42 U.S.C. § 1988. Petitioners further request a finding of law that no fees or other costs incurred after the offer of judgment be awarded to respondents. Petitioners further request that the taxable costs of petitioners before the circuit court and before this Court be awarded to petitioners against respondent, with this suit to be remanded solely for the award of those taxable costs by the circuit court which are not included by the Clerk of the Supreme Court in the mandate to the courts below. In the alternative, petitioners respectfully request directions issue to the district court on remand to consider the contingent fees paid in awarding additional fees, if any.

Respectively submitted,

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APPENDIX

APPENDIX A

**STATUTES IN EXISTENCE IN 1938 WHICH ALLOW
ATTORNEY'S FEES AS PART OF THE COSTS**

CLAYTON ACT, 15 U.S.C. § 15

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

enacted Oct. 15, 1914; no amendments

CLAYTON ACT, 15 U.S.C. § 15(b)

Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

enacted Oct. 15, 1914; no amendments.

COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 206

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

enacted June 19, 1934; no amendments.

COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 407

If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

enacted June 19, 1934, no amendments.

COPYRIGHT ACT OF 1909, 17 U.S.C. § 40

Court may "award to the prevailing party a reasonable attorney's fee as part of the costs."

enacted 1909, amended 1976

FEDERAL POWER ACT, 16 U.S.C. § 825q-1(b)(2)

The Commission may, under rules promulgated by it, provide compensation for reasonable attorney's fees, expert witness fees, and other costs of intervening or participating in any proceeding before the Commission to any person whose intervention or participation substantially contributed to the approval, in whole or in part, of a position advocated by such person. Such compensation may be paid only if the Commission has determined that—

(A) the proceeding is significant, and

(B) such person's intervention or participation in such proceeding without receipt of compensation constitutes a significant financial hardship to him.

enacted June 10, 1920, as added Nov. 9, 1978.

FEDERAL TRADE COMMISSION IMPROVEMENT ACT, 15 U.S.C. § 57a(h)(1)

(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section.

enacted Sept. 26, 1914, as added Jan. 4, 1975.

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, 15 U.S.C. § 15c(a)(2)

The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

enacted Oct. 15, 1914, as added Dec. 2, 1980.

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, 15 U.S.C. § 26.

In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

enacted Oct. 14, 1914; amended Sept. 30, 1976 to include attorney's fees.

MERCHANT MARINE ACT OF 1936, 46 U.S.C. § 1227

Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

enacted June 29, 1936; no amendments.

PACKERS AND STOCKYARDS ACT, 7 U.S.C. § 210(f)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit.

enacted Aug. 15, 1921; no amendments.

**PERISHABLE AGRICULTURAL COMMODITIES ACT,
7 U.S.C. § 499g(b), (c)**

(b) If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

(c) Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs.

enacted June 10, 1930; no amendments.

RAILWAY LABOR ACT, 45 U.S.C. § 153(p)

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

enacted May 20, 1926; no amendments.

SECURITIES ACT OF 1933, 15 U.S.C. § 77k(e)

In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

enacted May 27, 1933; no amendments.

SECURITIES EXCHANGE ACT, 15 U.S.C. § 78i(e)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

enacted June 6, 1934; no amendments.

SECURITIES EXCHANGE ACT, 15 U.S.C. § 78r(a)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

enacted June 6, 1934; no amendments.

**TRUST INDENTURE ACT, 15 U.S.C. § 77ooo(e),
www(a)**

ooo(e) The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right ~~or remedy under such indenture~~, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorney's fees against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant

www(a) In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense.

enacted May 27, 1933, as added Aug. 3, 1939.

UNFAIR COMPETITION ACT, 15 U.S.C. § 72

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section . . . shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

enacted Sept. 8, 1916; no amendments.

APPENDIX B**FEDERAL STATUTES AUTHORIZING THE AWARD OF ATTORNEY'S FEES AS COSTS, IN ADDITION TO THOSE PREVIOUSLY LISTED IN APPENDIX A.****ACT TO PREVENT POLLUTION FROM SHIPS, 33 U.S.C. § 1910(d)**

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party including the Federal Government.

enacted Oct. 21, 1980; no amendments

AGRICULTURAL UNFAIR TRADE PRACTICES, 7 U.S.C. § 2305

In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

enacted April 16, 1968; no amendments

BANK HOLDING COMPANY ACT, 12 U.S.C. § 1975

Any person who is injured in his business or property by reason of anything forbidden in . . . this title . . . shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

enacted Dec. 3, 1970; no amendments

CIVIL RIGHTS ACT OF 1964, TITLE II, 42 U.S.C. § 2000a-3(b)

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other

than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

enacted July 2, 1964; no amendments

CIVIL RIGHTS ACT OF 1964, TITLE VII, 42 U.S.C.
§ 2000e-5(k)

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

enacted July 2, 1964; no amendments

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT of
1976, 42 U.S.C. § 1988

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI, the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

enacted Oct. 19, 1976; amended Oct. 21, 1980, deleting reference to Internal Revenue Code.

CLEAN AIR ACT, 42 U.S.C. § 7413(b)

In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

enacted July 14, 1955; no amendments

CLEAN AIR ACT, 42 U.S.C. § 7604(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorneys and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted July 14, 1955; no amendments.

CLEAR AIR ACT, 42 U.S.C. § 7607(f)

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

enacted July 14, 1955; no amendments.

CLEAN AIR ACT, 42 U.S.C. § 7622(b)(2)(B)

If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

enacted July 14, 1955; no amendments.

CLEAN AIR ACT AMENDMENT OF 1970, 42 U.S.C.
§ 1857h-2(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted July 14, 1955, as added in Dec. 31, 1970.

CONSUMER PRODUCT SAFETY ACT, 15 U.S.C. § 2060(c)

A court may in the interest of justice include in such relief an award of the costs of suit, including reasonable attorneys' fees (determined in accordance with subsection (f) of this section and reasonable expert witnesses' fees.

enacted Oct. 27, 1972; amended May 11, 1976 to include award of attorneys' fees.

CONSUMER PRODUCT SAFETY ACT, 15 U.S.C.
§ 2072(a), (b)

(a) Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule . . . may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees: *Provided*, That the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and cost, unless such action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision is made in a statute of the United States, in any case in which the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

enacted Oct. 27, 1972; amended in 1976 and 1980 to include "interest of justice" and minimum amount in controversy, respectively.

CONSUMER PRODUCT SAFETY ACT, 15 U.S.C. § 2073

In any action under this section the court, may in the interest of justice award the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses fees.

enacted Oct. 27, 1972; amended in 1976, substituting "interest of justice" for prevailing party standard.

COPYRIGHT ACT, 17 U.S.C. § 505

Except as otherwise provided by this title, the court may also award a reasonable attorneys' fee to the prevailing party as part of the costs.

enacted Oct. 19, 1976; no amendments.

DEEP SEABED HARD MINERAL RESOURCES ACT, 30
U.S.C. § 1427(c)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party whenever the court determines that such an award is appropriate.

enacted June 12, 1980; no amendments.

ENDANGERED SPECIES ACT, 16 U.S.C. § 1540(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Dec. 28, 1973; no amendments.

**ENERGY POLICY AND CONSERVATION ACT, 42 U.S.C.
§ 6305(d)**

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Dec. 22, 1975; no amendments.

**ENERGY REORGANIZATION ACT OF 1974, 42 U.S.C.
§ 5851(e)2**

The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

enacted Nov. 6, 1978; no amendments.

**ETHICS IN GOVERNMENT ACT OF 1978, 2 U.S.C.
§ 288i(d)**

The Senate may by resolution authorize the reimbursement of any Member, officer, or employee of the Senate who is not represented by the Counsel for fees and costs, including attorneys' fees, reasonably incurred in obtaining representation.

enacted Oct. 26, 1978, no amendments.

**FEDERAL MINE SAFETY AND HEALTH ACT, 30 U.S.C.
§ 815(c)(3)**

Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and

prosecution of such proceedings shall be assessed against the person committing such violation.

enacted Dec. 30, 1969; no amendments.

**FEDERAL MINE SAFETY AND HEALTH ACT, 30 U.S.C.
§ 938(c)**

Whenever an order is issued under this subsection granting relief to a miner at the request of such miner, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by such miner for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing the violation.

enacted Dec. 30, 1976, as added May 19, 1972

**FEDERAL WATER POLLUTION CONTROL ACT
AMENDMENTS OF 1972, 33 U.S.C. § 1365(d)**

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted June 30, 1948, as added Oct. 18, 1972.

**FOREIGN INTELLIGENCE SURVEILLANCE ACT OF
1978, 50 U.S.C. § 1810(c)**

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover—

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

enacted Oct. 25, 1978; no amendments.

**GOVERNMENT IN THE SUNSHINE ACT, 5 U.S.C.
§ 552b(i)**

The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes.

enacted Sept. 13, 1976; no amendments.

HOBBY PROTECTION ACT, 15 U.S.C. § 2102

In any such action, the court may award the costs of the suit, including reasonable attorneys' fees.

enacted Nov. 29, 1973; no amendments.

**JEWELERS HALL-MARK ACT, 15 U.S.C.
§ 298(b), (c), (d)**

(b) Any competitor, customer or competitor of a customer of any person in violation of . . . this title, or any subsequent purchaser of an article of merchandise which has been the subject of a violation . . . of this title . . . shall recover damages and the cost of suit, including a reasonable attorney's fee.

(c) Any duly organized and existing jewelry trade association shall be entitled to injunctive relief restraining any person in violation . . . of this title from further violation . . . and if successful shall recover the cost of suit, including a reasonable attorney's fee.

(d) Any defendant against whom a civil action is brought under the provisions of . . . this title shall be entitled to recover the cost of defending the suit, including a reasonable attorney's fee, in the event such action is terminated without a finding by the court that such defendant is or has been in violation of . . . this title.

enacted Nov. 2, 1978; amended Jan. 12, 1983 to award attorney's fees under listed conditions.

**JURY SYSTEM IMPROVEMENT ACT OF 1978, 28 U.S.C.
§ 1875(d)(2)**

In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs. The court may tax a defendant employer, as costs payable to the court, the attorney fees and expenses incurred on behalf of a prevailing employee, where such costs were expended by the court pursuant to paragraph (1) of this subsection. The court may award a prevailing employer a reasonable attorney's fee as part of the costs only if the court finds that the action is frivolous, vexatious, or brought in bad faith.

enacted Nov. 2, 1978; amended Jan. 12, 1983 to award attorney's fees under listed conditions.

**MAGNUSON-MOSS WARRANTY ACT, 15 U.S.C.
§ 2310(d)2**

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorney's fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

enacted Jan. 4, 1975; no amendments.

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT, 33 U.S.C. § 1415(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Oct. 23, 1972; no amendments.

NATIONAL HISTORIC PRESERVATIONS ACT, 16 U.S.C. § 470w-4

In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

enacted Oct. 15, 1966, as added Dec. 12, 1980.

NOISE CONTROL ACT OF 1972, 42 U.S.C. § 4911(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

enacted Oct. 27, 1972; no amendments.

OCEAN DUMPING ACT, 33 U.S.C. § 1415(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Oct. 23, 1972; no amendments.

ORGANIZED CRIME CONTROL ACT OF 1970, 18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation ... of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

enacted Oct. 15, 1970; no amendments.

OUTER CONTINENTAL SHELF LANDS ACT, 43 U.S.C. § 1349(a)(5)

A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate.

enacted Aug. 7, 1953, as added Sept. 18, 1978.

POWER PLANT AND INDUSTRIAL FUEL USE ACT OF 1978, 42 U.S.C. § 8435(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Nov. 9, 1978; no amendments.

PRIVACY ACT OF 1974, 5 U.S.C. § 552a(g)(2)(B), (3)(B)

(2)(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

enacted Dec. 31, 1974; no amendments.

RAILROAD REVITALIZATION AND REFORM ACT, 45 U.S.C. § 854(g)

The United States shall indemnify the Corporation, its Board of Directors, and its individual directors against all costs and expenses (including fees of accountants, experts, and attorneys) actually and reasonably incurred in defending any litigation testing the legal validity of any security, obligation, agreement, or transaction, given, issued, or entered into pursuant to such subsection (e) of this section.

enacted Feb. 5, 1976; no amendments.

REAL ESTATE SETTLEMENT PROCEDURES ACT, 12 U.S.C. § 2607(d)

In any successful action to enforce the liability under this paragraph, the court may award the court costs of the action together with a reasonable attorney's fee as determined by the court.

enacted Dec. 22, 1974; no amendments.

REHABILITATION ACT OF 1973, 29 U.S.C. § 794a(b)

In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

enacted Sept. 26, 1973, as added Nov. 6, 1978.

SAFE DRINKING WATER ACT, 42 U.S.C. § 300j-8(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate.

enacted June 1, 1944; no amendments.

SOLID WASTE DISPOSAL ACT, 42 U.S.C. § 6971(c)

(c) Whenever an order is issued under this section to abate such violation, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

enacted Oct. 21, 1976; no amendments.

SOLID WASTE DISPOSAL ACT, 42 U.S.C. § 6972(e)

(e) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

enacted Oct. 21, 1976; amended Nov. 8, 1978 to include award of attorney's fees.

SURFACE MINING CONTROL AND RECLAMATION ACT, 30 U.S.C. § 1270(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of

litigation, (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Aug. 3, 1977; no amendments.

SURFACE MINING CONTROL AND RECLAMATION ACT, 30 U.S.C. § 1275(e)

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review or the Secretary, resulting from administrative proceedings, deems proper.

enacted Aug. 3, 1977; no amendments.

SURFACE MINING CONTROL AND RECLAMATION ACT, 30 U.S.C. § 1293(c)

Whenever an order is issued under this section to abate any violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the persons committing the violation.

enacted Aug. 3, 1977; no amendments.

TOXIC SUBSTANCE CONTROL ACT, 15 U.S.C. § 2605(c)(4)(A)

The Administrator may, pursuant to rules prescribed by the Administrator, provide compensation for reasonable attorneys' fees, expert witness fees, and other costs of participating in a rulemaking proceeding for the promulgation of a rule under subsection (a) of this section

enacted Oct. 11, 1976; no amendments.

TOXIC SUBSTANCE CONTROL ACT, 15 U.S.C. § 2622(b)(2)(B)

If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred, as determined by the Secretary by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

enacted Oct. 11, 1976; no amendments.

VOTING RIGHTS ACT AMENDMENTS OF 1975, 42 U.S.C. § 19731(c)

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

enacted Aug. 6, 1965; amended Aug. 6, 1975 to include award of attorney's fees.

WATER POLLUTION PREVENTION AND CONTROL ACT, 33 U.S.C. § 1365(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted June 30, 1948, as added Oct. 18, 1972.

WATER POLLUTION PREVENTION AND CONTROL ACT, 33 U.S.C. § 1367

Whenever an order is issued under this section to abate such violation, at the request of the applicant, a sum equal to

the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

enacted June 30, 1948, as added Oct. 18, 1972.

WIRE INTERCEPTION ACT, 18 U.S.C. § 2520

Any person whose wire or oral communication is intercepted, . . . shall (1) have a civil cause of action against any person who intercepts, . . . and (2) be entitled to recover from any such person—

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

enacted June 19, 1968; no amendments.

1
No. 83-1437

Office-Supreme Court, U.S.
FILED

JUL 16 1984

WILLIAM L. STEWAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI AND
LAWRENCE RHODE, PETITIONERS

v.

ALFRED W. CHESNY, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF
STEVEN CHESNY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS**

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49 p

QUESTION PRESENTED

Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff rejects a pre-trial offer of judgment and then obtains a less favorable final judgment, the plaintiff "must pay the costs incurred after the making of the offer." The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, provides that in certain enumerated actions the court may award the prevailing party "a reasonable attorney's fee as part of the costs." Against this background, the United States will address the following question:

Whether a plaintiff who rejects a Rule 68 offer of judgment that is more favorable to the plaintiff than the judgment finally obtained may shift to the defendant, under 42 U.S.C. (Supp. V) 1988, the attorneys' fees incurred by the plaintiff after the making of the defendant's more favorable offer of judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND
LAWRENCE RHODE, PETITIONERS

v.

ALFRED W. CHESNY, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF
STEVEN CHESNY, DECEASED

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS**

INTEREST OF THE UNITED STATES

This case presents the important question whether attorneys' fees, which are statutorily defined as "part of the costs" in The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, are among the "costs" encompassed by Rule 68 of the Federal Rules of Civil Procedure for purposes of determining a plaintiff's liability for his own attorneys' fees when the plaintiff rejects an offer of judgment under Rule 68 but later obtains a final judgment less favorable than the offer. The issue arises because, under Rule 68, such a plaintiff is liable for "the costs incurred" after the offer is made.

The United States has a substantial interest in the resolution of this issue. The decision of the court below, holding that civil rights plaintiffs may recover post-offer attorneys' fees even if the final judgment they obtain is less favorable than the Rule 68 offer they rejected, significantly impairs the effectiveness of Rule 68 as a tool for encouraging settlements and avoiding protracted litigation. Accordingly, the decision may well result in an

unnecessary increase in the workload of the already overburdened federal courts. In addition, as a defendant, the United States may face potential liability for attorneys' fees under a host of fee-shifting statutes (most notably, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k)) that, like Section 1988, specifically define attorneys' fees "as part of the costs."

The United States makes regular use of Rule 68 generally and in civil rights litigation in particular. Civil rights cases are expensive to take to trial; they may involve many witnesses and thousands of documents. See *Hensley v. Eckerhart*, No. 81-1244 (May 16, 1983), slip op. 11-12. At the same time, the realistic value of the claims asserted is often relatively small, notwithstanding the frequent inclusion of rather extravagant claims for relief. In appropriate cases, therefore, the United States makes a reasonable offer of judgment. Such offers are made not only to avoid needless litigation but also to ensure that the government will not be required to pay the plaintiff's attorneys' fees (which often far exceed the plaintiff's damages) if the plaintiff prevails on some aspect of his claim. Incorporation of Section 1988's definition of "costs" into Rule 68 (which does not itself define "costs") would serve the important purpose of relieving defendants of the burden of plaintiffs' attorneys' fees for continued litigation that produces no additional benefits. But if plaintiffs are assured that they will recover attorneys' fees even if they reject reasonable offers and ultimately obtain less favorable judgments, there will be very little incentive for plaintiffs to accept reasonable settlement offers. Accordingly, the United States joins petitioners in urging reversal of the decision below.

SUMMARY OF ARGUMENT

Notwithstanding Section 1988's definition of attorneys' fees as "part of the costs," the court of appeals held that a civil rights plaintiff who obtains a less favorable final judgment than the Rule 68 offer he rejects is en-

titled to recover his post-offer attorneys' fees from the defendant. The facts of this case vividly demonstrate the anomalous result that flows from such a ruling. Petitioners made an obviously reasonable offer of judgment to settle this case for \$100,000, which would have compensated respondent for his pre-offer attorneys' fees of \$32,000 and \$68,000 in damages. Respondent rejected that offer and then ran up additional attorneys' fees of \$171,000 to secure a jury verdict of \$60,000—a net loss to respondent of \$8,000. To require petitioners to pay \$171,000 in post-offer fees incurred solely because of respondent's unreasonable failure to accept a favorable settlement is contrary to elementary principles of fairness.

The law does not require such an inequitable result. The court of appeals' decision conflicts with the plain meaning of Rule 68 and Section 1988 and rests on erroneous policy considerations. Rule 68 and Section 1988 can be easily harmonized to produce a result that is faithful to the purposes of the statute and the rule and fair to both parties.

I. Because Rule 68 does not define "costs," it is appropriate to look to Congress's definition of that term in the underlying statute. Section 1988 expressly includes attorneys' fees as "part of the costs." Thus, although the traditional understanding of "costs" might not ordinarily include attorneys' fees, here Congress has exercised its unquestioned authority to define fees as costs, and that determination is binding on the courts. See, e.g., *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 449 n.7 (1982); *Hutto v. Finney*, 437 U.S. 678, 693-697 (1978).

Moreover, the plain language of Section 1988 is no accident. Contrary to the court of appeals' assumption, the contemporaneous understanding of the term "costs" at the time of Rule 68's promulgation in 1938 clearly included attorneys' fees. By 1938, Congress had enacted numerous statutes—encompassing much of the major legislation of the period—that defined attorneys' fees "as

part of the costs," and it has continued to do so with ever-increasing frequency. See App., *infra*, 1a-6a. The substantial number of statutes affected, coupled with the rule that courts must defer to Congress's definition of costs and attorneys' fees, compels a reading of Rule 68 and Section 1988 that harmonizes the language of each.

II. Although the court of appeals acknowledged that a plain meaning analysis would be "logical" (Pet. App. A8), it rejected that approach based on its understanding of the policies behind Section 1988 and its view that the Rules Enabling Act, 28 U.S.C. 2072, prohibits interpreting Rule 68 costs as encompassing attorneys' fees under Section 1988. The court erred in both respects.

A. Holding a plaintiff responsible for his own post-offer attorneys' fees does not "cut[] against the grain of section 1988" (Pet. App. A8). While it is undoubtedly true that the primary purpose of Section 1988 was to encourage the bringing of meritorious civil rights actions, Congress never intended Section 1988 to override all competing policies. Rather, fee awards under Section 1988 must be "reasonable." Here, respondent seeks to charge petitioners with \$171,000 in post-offer attorneys' fees for work that produced no additional benefits; on the contrary, that work resulted in a jury verdict \$8,000 less than petitioners' offer. In these circumstances, it would be "unreasonable," and thus contrary to Section 1988, to reward respondent for his mistake in judgment.

In addition, the lower court's decision is inconsistent with this Court's approach to Section 1988 as set forth in *Hensley v. Eckerhart*, No. 81-1244 (May 16, 1983). There, the Court stressed that the amount of fees recoverable under Section 1988 depends, to a very large extent, on the degree of success obtained. It is quite obvious that a plaintiff who rejects a reasonable offer of judgment and then obtains a less favorable final judgment has not achieved any success whatsoever attributable to his post-offer efforts, and it would be contrary to the teaching of *Hensley* to reward such a plaintiff with his post-offer attorneys' fees.

Congress's concern with imposing reasonable limits on fee awards under Section 1988 demonstrates that there is ample room for harmonizing the policies of that Section with other provisions of law, including Rule 68. Rule 68 was intended to encourage settlements and thereby avoid unnecessary litigation; it also incorporates elementary principles of fairness to defendants, who should not be saddled with a plaintiff's unnecessary litigation expenses. Indeed, the goals of Rule 68 and Section 1988 are virtually identical—to create an incentive structure that will encourage meritorious and discourage pointless litigation. The court of appeals thus erred in elevating its single-minded perception of Section 1988's purposes over the more balanced approach intended by Congress.

B. Concluding that the "right" to attorneys' fees under Section 1988 is "substantive," the court below also held that an interpretation of Rule 68 costs that includes attorneys' fees would run afoul of the Rules Enabling Act, 28 U.S.C. 2072, which provides that the federal rules may not alter any "substantive right." The court rested its conclusion on the substance/procedure dichotomy originally formulated by this Court in diversity cases, in the immediate wake of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). Even in diversity cases, however, the Court long ago abandoned that approach as a test for determining the validity of a federal rule. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 469-474 (1965). And the test has *never* been applied in non-diversity cases such as this one, where the concern is not displacement of state substantive law, but rather the allocation of authority between Congress and this Court. Thus, the only relevant inquiries are whether the Constitution permits Congress to delegate to the Court authority to promulgate the particular rule in question (an issue not here in dispute), and, if so, whether Congress has exercised its authority to supersede the rule promulgated by the Court.

The federal rules have the force of statutes, there is a strong presumption in favor of their validity, and there is no indication whatsoever, much less the necessary clear evidence, that Congress intended an implied, partial repeal of Rule 68 when it enacted Section 1988. Thus, the Rules Enabling Act presents no obstacle to the ordinary operation of Rule 68 in this case.

ARGUMENT

A PLAINTIFF WHO REJECTS A RULE 68 OFFER OF JUDGMENT AND THEN OBTAINS A LESS FAVORABLE FINAL JUDGMENT MAY NOT SHIFT HIS POST-OFFER ATTORNEYS' FEES TO THE DEFENDANT UNDER 42 U.S.C. (SUPP. V) 1988

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, provides that in certain enumerated actions the court may award the prevailing party "a reasonable attorney's fee *as part of the costs*" (emphasis added). Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff rejects a pre-trial offer of judgment and then obtains a less favorable final judgment, the plaintiff "must pay the costs incurred after the making of the offer." The issue in this case is whether such a plaintiff may rely on Section 1988 to shift his own post-offer attorneys' fees to the defendant. In our submission, fee-shifting in these circumstances is barred by elementary principles of statutory construction as well as by sound reasons of policy.

I. Settled Principles Of Statutory Construction Require That The Definition Of Attorneys' Fees "As Part Of The Costs" In 42 U.S.C. (Supp. V) 1988 Be Harmonized With The Language Of Fed. R. Civ. P. 68

A. Neither the language nor the history of Rule 68 defines "costs."¹ Accordingly, one must look elsewhere

¹ The Advisory Committee responsible for the original Federal Rules of Civil Procedure limited its entire explanation of Rule 68 to a citation to three state statutes, 2 Minn. Stat. § 9323 (Mason

to ascertain the items encompassed by the term "costs" as it is used in the rule. Ordinarily, it might be proper to look to the traditional understanding of costs. But when Congress has specified a particular meaning for "costs," Congress's definition must control. See *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 449 n.7 (1982) (emphasis added) ("Unless so defined by statute, attorney's fees are not generally considered 'costs' * * *"); *Hutto v. Finney*, 437 U.S. 678, 693-697 (1978) (Congress may amend definition of costs to include attorneys' fees and have it apply to all litigants); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 772 (1980) (Burger, C.J., dissenting); cf. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (Congress, not the courts, determines when and how attorneys' fees shall be awarded).² It follows that

1927); 4 Mont. Code Ann. § 9770 (1935); N.Y. C.P.A. § 177 (1937). Neither these statutes nor the practice under them aid in determining the meaning of "costs" in Rule 68. Cf., e.g., *Watkins v. W.E. Neiler Co.*, 135 Minn. 343, 160 N.W. 864 (1917); *Morris-Turner Live Stock Co. v. Director Gen. of Railroads*, 266 F. 600 (D. Mont. 1920); *Margulis v. Solomon & Berck Co.*, 223 A.D. 634, 229 N.Y.S. 157 (1928). Rule 68 elicited virtually no discussion in the debates of the Advisory Committee. See ABA, *Rules of Civil Procedure for the District Courts of the United States* 337-338 (1938). The history of the 1946 and 1966 amendments to Rule 68 is similarly unenlightening. See Fed. R. Civ. P. 68 advisory committee note, 28 U.S.C. App. at 637.

² Notwithstanding the court of appeals' apparently contrary conclusion (see Pet. App. A11), this is all that *Roadway Express*, *supra*, actually held. In *Roadway Express*, the issue was whether the "costs" to be imposed on an attorney under 28 U.S.C. 1927 should include attorneys' fees because the action was brought under Title VII, the attorneys' fee provision of which defines fees "as part of the costs" (42 U.S.C. 2000e-5(k)). The Court ruled that "costs" in 28 U.S.C. 1927 should be read to track the definition of "costs" in 28 U.S.C. 1920 (which does not include attorneys' fees) because Congress enacted the two statutes together in 1853 as part of one, comprehensive legislative package. 447 U.S. at 757, 759-760. Rule 68, on the other hand, is not part of an integrated statute or rule provision that defines "costs." Instead, as Justice

when the action involves a statute that, like Section 1988, authorizes the award of attorneys' fees "as part of the costs," Rule 68 costs must include any attorneys' fees that might be awarded under the statute. Rule 68 thus requires that respondent bear that portion of his own attorneys' fees incurred after the making of petitioners' offer of judgment.³

Such a straightforward, "plain language" construction of the interplay between Rule 68 and attorneys' fee statutes has been widely accepted. See, e.g., *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362-363 (1981) (Powell, J., concurring); *Fulps v. City of Springfield*, 715 F.2d 1088, 1091-1095 (6th Cir. 1983); *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 113-117 (N.D. Cal.

Powell has noted, "[i]n approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation. Cf. Fed. Rule Civ. Proc. 54(d)." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 364 n.2 (1981) (Powell, J., concurring).

³ Because Rule 68 is concerned only with liability for costs incurred after the making of the offer, respondent's entitlement to his pre-offer attorneys' fees of \$32,000 is not at issue in this case. Moreover, the district court held (Pet. App. B10) that petitioners were not entitled to recover their post-offer costs, including attorneys' fees, from respondent, and petitioners have not challenged that ruling. Thus, this case does not present any issue concerning the circumstances in which a defendant might seek to collect his post-offer costs from the plaintiff.

In any event, reading "costs" in Rule 68 to include Section 1988 attorneys' fees does not have the result, suggested in Justice Rehnquist's dissenting opinion in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 378 (1981), of requiring civil rights plaintiffs who reject Rule 68 offers also to absorb the defendant's attorneys' fees as costs. *Delta Air Lines* held that Rule 68 is entirely inapplicable when judgment is rendered in favor of the defendant. Thus, in any case to which Rule 68 applies, the defendant will by definition have lost the case. Section 1988, on the other hand, provides that fees may be awarded only to the prevailing party. Thus, the condition that entitles the defendant to be considered for the benefits of Rule 68 is the same condition that precludes him from taking advantage of Section 1988.

1979); *Scheriff v. Beck*, 452 F. Supp. 1254, 1259-1260 (D. Colo. 1978); cf. *Roadway Express*, 447 U.S. at 771-772 (Burger, C.J., dissenting) (same reasoning applied to "costs" in 28 U.S.C. 1927). Indeed, even the court below described this approach to the operation of Rule 68 as "logical" (Pet. App. A8), but it based its decision instead on its understanding of policy considerations extraneous to the statutory language. In so doing, the court ignored well-established principles of statutory construction, as well as logic, that support reading "costs" in Rule 68 to include attorneys' fees authorized by statutes defining those fees "as part of the costs."

Statutes should be construed so as to avoid making any word meaningless or superfluous. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Fulps*, 715 F.2d at 1093 & n.4 (citing cases). Moreover, statutory language is to be given its plain and ordinary meaning. *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968). The meaning of the phrase describing attorneys' fees "as part of the costs" is obvious. It means that attorneys' fees are to be treated like all other costs of litigation, to be granted if other costs are granted and to be denied if other costs are denied. Rule 68 denies costs incurred after the making of an offer more generous than the judgment finally obtained. The plain language of Section 1988 makes attorneys' fees a part of those costs.

When it drafted Section 1988, Congress, of course, simply could have authorized the recovery of attorneys' fees. But Congress chose to go further and characterize the fees as costs. In *Hutto v. Finney*, 437 U.S. at 693-697, this Court recognized that Congress's choice of language was deliberate.⁴ While we do not contend that

⁴ In *Hutto*, the Court held that Congress may redefine costs to include attorneys' fees without running afoul of the Eleventh Amendment. Congress surely knew that costs "have traditionally been awarded without regard for the States' Eleventh Amendment immunity" (437 U.S. at 695). Thus, by defining attorneys' fees

Congress chose this language specifically envisioning its effect in conjunction with Rule 68, we do contend, as this Court held in *Hutto*, that Congress's decision to "impose[] attorney's fees 'as part of the costs'" (*id.* at 695), was not simple inadvertence. That being the case, this Court should give the language of Section 1988 its ordinary meaning.

B. There is a still more compelling reason for this Court to read Section 1988's authorization for attorneys' fee awards "as part of the costs" to mean exactly that. Congress has enacted numerous statutes authorizing attorneys' fee awards for parties litigating certain claims in federal court. The vast majority of these statutes direct that such fees as are awarded should be assessed as costs. See Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 898-899. See also Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976: Source Book* 303-313 (Comm.

"as part of the costs," Congress was safeguarding its intent that states be held liable for attorneys' fees in civil rights litigation. See S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 & n.14 (1976). In upholding that intent, this Court held that "[j]ust as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States" (437 U.S. at 696 (emphasis added)). And, in concluding that "[t]here is ample precedent for Congress' decision to authorize an award of attorney's fees as an item of costs" (*id.* at 697 (emphasis added)), the Court emphasized the limited nature of its holding in a footnote: "Thus we do not suggest that our analysis would be the same if Congress were to expand the concept of costs beyond the traditional category of litigation expenses" (*id.* at 697 n.27 (emphasis added)). The Court thus explicitly recognized that Congress deliberately and intentionally categorized attorneys' fees under Section 1988 as an item of costs. See also *Roadway Express*, 447 U.S. at 772 (Burger, C.J., dissenting). The issue then becomes whether there is some compelling reason for the Court to ignore traditional canons of statutory construction so as not to give effect to this deliberate choice of language by Congress. We submit there is none.

Print 1976) (compiling 90 federal attorneys' fee statutes). In an appendix to this brief, we have listed the 141 federal attorneys' fee statutes that our research has uncovered. App., *infra*, 1a-9a. Of these, 91—including many of our most important legislative enactments⁶—describe attorneys' fees as part of the costs of litigation. With so many, and so many important, pieces of legislation involved, this Court should not ignore the effect of any of the statutory language and should adopt the "specific and explicit provisions for the allowance of attorneys' fees" made by Congress. *Alyeska*, 421 U.S. at 260 (emphasis added).

Indeed, the main point of this Court's decision in *Alyeska* was its recognition that Congress has *not* extended "any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted" (421 U.S. at 260 (emphasis added)). Rather, "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine" (*id.* at 262 (emphasis added)). The proper interpretation is one that relies on the language Congress has chosen (*id.* at 269):

Since the approach taken by Congress to this issue has been to carve out specific exceptions * * * courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees * * * or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts'

⁶ Among the statutes authorizing attorneys' fee awards as costs of litigation are Title VII, 42 U.S.C. 2000e-5(k); the Copyright Act, 17 U.S.C. 505; the Railway Labor Act, 45 U.S.C. 153; the Communications Act, 47 U.S.C. 206, 407; the Interstate Commerce Act, 49 U.S.C. 8, 16, 908; the Clayton (Anti-Trust) Act, 15 U.S.C. 15; the Securities Act of 1933, 15 U.S.C. 77k(e); the Trust Indenture Act of 1939, 15 U.S.C. 77ooo(e); and the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a).

assessment of the importance of the public policies involved in particular cases.

Yet this is precisely what was done by the court below in refusing to give effect to the language of Section 1988 making attorneys' fees "part of the costs."⁶

C. Notwithstanding the clear interplay between the plain language of Rule 68 and the plain language of Section 1988, the court of appeals concluded that there is no reason to suppose that "costs" in Rule 68 was meant to include attorneys' fees. Pet. App. A4-A5, A9-A11. The court of appeals assumed that awards of attorneys' fees were "uncommon" in 1938, when Rule 68 was promulgated. Pet. App. A4. This assumption is similar to the approach taken by the dissent in *Delta Air Lines*, 450 U.S. at 377 (Rehnquist, J., dissenting), which stressed the importance of looking to the "contemporaneous understanding" of the term "costs" at the time of Rule 68's promulgation. The dissent assumed that "the 'contemporaneous understanding' of 'costs' when the Federal Rules of Civil Procedure were promulgated in 1938 did not include attorneys' fees any more than it did in 1813 when the predecessor to § 1927 was enacted." *Delta Air Lines*, 450 U.S. at 377 (Rehnquist, J., dissenting).

Additional research reveals, however, that this assumption is probably incorrect. Between 1813 and 1938, Congress itself began the practice of awarding attorneys'

⁶ The rule established in *Alyeska* also is sufficient answer to the objection that our interpretation of Rule 68 and Section 1988 would create a two-tiered system of cost-shifting under Rule 68 depending upon the language of the statute authorizing attorneys' fees. See *Delta Air Lines*, 450 U.S. at 378 (Rehnquist, J., dissenting); *Roadway Express*, 447 U.S. at 762-763. If this is the result, it is a result compelled by Congress's choice of language and a matter for Congress to correct if it chooses. Indeed, Section 1988 itself is Congress's response to the two-tiered system for awarding attorneys' fees created by this Court's *Alyeska* decision. See S. Rep. 94-1011, 94th Cong., 2d Sess. 1-2 (1976); page 15, *infra*.

fees as part of the costs. By the time Rule 68 was promulgated in 1938, Congress had on numerous occasions defined the term "costs" to include attorneys' fees. See App., *infra*, 1a-3a, 6a. Moreover, it appears that the great majority of statutes enacted prior to 1938 that authorized attorneys' fee awards did so as part of the costs.⁷ Furthermore, these statutes constituted much of the major legislation of the period: the Clayton (Anti-Trust) Act, 15 U.S.C. 15; the Securities Act of 1933, 15 U.S.C. 77k(e); the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a); the Interstate Commerce Act, 49 U.S.C. 8, 16, 908; the Railway Labor Act, 45 U.S.C. 153; and the Copyright Act of 1909, 17 U.S.C. 505 (formerly codified at 17 U.S.C. 40).⁸

Congress must be presumed to have had knowledge of these provisions when Rule 68 was promulgated in 1938. Indeed, given the number and prominence of the relevant statutes, this presumption is not merely a legal fiction; it is difficult to believe that Congress was unaware of the terms of so many enactments. Thus, by 1938, the contemporaneous understanding of costs was clearly quite different than it had been in 1813,⁹ and there is no basis

⁷ The appendix shows that of the 25 statutes currently in force that authorize attorneys' fee awards and that were in force at the time Rule 68 was promulgated, 19 describe attorneys' fees as part of the costs. App., *infra*, 1a-3a, 6a-8a. The numbers may well have been larger in the past, for the appendix does not include statutes that were enacted and in force around 1938 but subsequently have been repealed.

⁸ The legislative alterations in the traditional definition of "costs" to include attorneys' fees did not go unnoticed in the literature either. See, e.g., Goodhart, *Costs*, 38 Yale L.J. 849, 878 (1929) (footnotes omitted) ("[A] number of recent federal and state statutes include provisions giving substantial costs to the successful party. Thus the Clayton Act allows * * * reasonable attorney's fees * * *").

⁹ The Court itself has acknowledged the effect of these statutes on the traditional understanding of "costs." In *Hutto*, 437 U.S. at 697 n.27 (emphasis added), the Court recognized that including

for concluding that Congress had in mind a fixed definition of costs that excluded attorneys' fees. This history, in conjunction with the mandate of *Alyeska*, the great number of statutes affected, and the policy considerations discussed below, all counsel the Court to read both Rule 68 and Section 1988 according to their plain meaning.

II. The Court Of Appeals Erred In Rejecting The "Logical" Approach To Harmonizing Rule 68 And Section 1988

The court of appeals acknowledged that the construction of Rule 68 for which we have argued above is "logical" (Pet. App. A8), but it then proceeded to discard logic in favor of a misguided policy analysis and an obsolete and inappropriate approach to the Rules Enabling Act, 28 U.S.C. 2072. As we demonstrate below, the court erred in both respects.

A. The Policies Underlying Both Section 1988 And Rule 68 Require Limiting A Plaintiff's Attorneys' Fee Award To Fees Incurred Before The Making Of The Defendant's Offer Of Judgment

1. Contrary to the court of appeals' conclusion, holding a plaintiff responsible for his own post-offer attorneys' fees does not "cut[] against the grain of section 1988" (Pet. App. A8). Rather, construing "costs" under Rule 68 as encompassing attorneys' fees under Section 1988 is fully consistent with congressional intent in enacting Section 1988 and, indeed, is the only result that harmonizes that intent with the clear and important purposes underlying the promulgation and congressional consideration of Rule 68. See *Delta Air Lines*, 450 U.S. at 364 (Powell, J., concurring). There is no support for concluding, as did the court of appeals, that in enacting Section 1988 Congress impliedly intended to curtail the ordinary application of Rule 68. In operation, the two

attorneys' fees in costs did not "expand the concept of costs beyond the traditional category of litigation expenses."

provisions need not come into conflict. It is possible to award attorneys' fees within the terms of Section 1988 while limiting such fees, as is required by Rule 68, to those incurred before an offer of judgment. And while the legislative history of Section 1988 is silent with respect to Rule 68 specifically, it is quite clear that Congress did not think it was establishing an unqualified right to attorneys' fees when it enacted Section 1988.¹⁰

Congress provided for an award of "a reasonable attorney's fee as part of the costs" in Section 1988 in response to this Court's rejection in *Alyeska* of the "private attorney general" rationale that had been employed by some lower courts as a basis for attorneys' fee awards in litigation deemed to further the public interest. S. Rep. 94-1011, 94th Cong., 2d Sess. 1-2 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 1-3 (1976). Undoubtedly, as the court below noted, the primary purpose of Section 1988 is to encourage the bringing of meritorious civil rights actions in order to utilize fully "private attorneys general" in securing compliance with civil rights laws. See Pet. App. A8. But Section 1988 is not an unqualified, single-minded provision intended to override any contrary policies that stand in its way.¹¹

¹⁰ This silence concerning Rule 68 in the legislative history of Section 1988 takes on some significance when one remembers that Rule 68 has been part of the Federal Rules of Civil Procedure since 1938 and that statutes taxing attorneys' fees "as part of the costs" have been in existence even longer. See pages 12-13 & note 7, *supra*.

¹¹ On several recent occasions, this Court has rejected similar arguments for subordinating other rules of law to the goal of enforcing the civil rights laws. For example, in *General Telephone Co. v. Falcon*, 457 U.S. 147, 156-159 (1982), the Court held that a private Title VII plaintiff seeking to maintain a class action must comply with the requirements of Fed. R. Civ. P. 23. Similarly, the Court refused to find that Congress implicitly intended to exempt civil rights cases from the ordinary operation, under 28 U.S.C. 1738, of *res judicata*, *Migra v. Warren City School Dist. Bd. of Educ.*, No. 82-738 (Jan. 23, 1984), slip op. 4-9; *Kremer v. Chemical*

Rather, fee awards under Section 1988 must be "reasonable."¹² The debates over passage of Section 1988 reflect Congress's concern that the bill could induce plaintiffs and plaintiffs' attorneys to pursue marginal or frivolous litigation. During the House hearings on the bill that was ultimately enacted as Section 1988, Representative Seiberling noted that the bill "certainly [was] not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit * * *." *Awarding of Attorneys' Fees: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 8 (1975). See also, e.g., 122 Cong. Rec. 31473, 31474, 31830 (1976) (statements of Sen. Allen); 122 Cong. Rec. 31832 (1976) (remarks

Constr. Corp., 456 U.S. 461 (1982), and of collateral estoppel, *Allen v. McCurry*, 449 U.S. 90, 97-99 (1980). In these cases, the Court held that plaintiffs seeking to vindicate the public policy of civil rights enforcement must suffer the same consequences as any other plaintiff when their own conduct in a lawsuit is such as to invoke well-established rules reflecting concerns of judicial economy and fairness to defendants. It is difficult to see why the result should be any different with respect to Rule 68's policy of encouraging settlement of marginal lawsuits. See *Delta Air Lines*, 450 U.S. at 352, 356, 359 n.24; *id.* at 363 (Powell, J., concurring); *id.* at 380 (Rehnquist, J., dissenting).

¹² The court of appeals avoided the limitations established in the statute and the legislative history by relying on a passage from the Senate Report stating that private attorneys general "should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose" (Pet. App. A8 (quoting S. Rep. 94-1011, *supra*, at 5)). This language, however, is irrelevant to the issue before the Court. There is no question here of respondent's having to pay petitioners' counsel fees; the only question is whether respondent's post-offer fees should be borne by petitioners. See page 8 note 3, *supra*.

of Sen. Abourezk); 122 Cong. Rec. 31834 (1976) (remarks of Sen. Helms).¹³

This legislative history should be considered not in the abstract, but against the factual background of this case, in which respondent seeks to charge petitioners \$171,000 in post-offer attorneys' fees for work that did not produce any additional benefits; instead, the post-offer fees were incurred to produce a jury verdict that was \$8,000 less than petitioners' offer.¹⁴ Given these results, it is "unreasonable," and thus contrary to Section 1988, to reward respondent's attorneys with \$171,000 in post-offer fees. As the court stated in *Waters v. Heublein, Inc.*, 485 F. Supp. at 114, there is "little reason to reward

¹³ Cf. Note, *Delta Air Lines, Inc. v. August: The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604, 631 (1982). In fact, even in cases in which there is no clear rule governing the allocation of costs, no fee award is appropriate when "special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See also S. Rep. 94-1011, *supra*, at 4 (adopting *Piggie Park* standard); H.R. Rep. 94-1558, *supra*, at 6 (same). Among the special circumstances for denying attorneys' fees is the maintenance of suit "vexatiously." *Piggie Park*, 390 U.S. at 402 n.4. As this Court has recognized, "Rule 68 is an outgrowth of the equitable practice of denying costs to a plaintiff 'when he sues vexatiously after refusing an offer of settlement.'" *Delta Air Lines*, 450 U.S. at 356 (footnote omitted). Congress's intentions with respect to Section 1988 and Rule 68 thus mesh quite neatly. See pages 18-21, *infra*.

¹⁴ Although the offer of judgment in this case was for "a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND (\$100,000) DOLLARS" (J.A. 17), the courts below never suggested that the form of the offer was invalid by virtue of setting a ceiling on attorneys' fees. Cf. *Delta Air Lines*, 450 U.S. at 365-366 (Powell, J., concurring). Since Rule 68 certainly was not intended to preclude parties from agreeing on the amount of attorneys' fees (*id.* at 365 n.4)—and probably would be unworkable for defendants if so construed (see Pet. App. A3-A4)—we do not think it is of any consequence that the parties in this case stipulated to the amount of respondent's pre-offer fees after trial rather than at the time the offer was made.

[an] attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits."

As the legislative history discussed above makes clear, no such unreasonable result is required to effectuate the policies of Section 1988. Rather, Congress left ample room for Section 1988 to be intermeshed with other provisions of law reflecting equally important policies involved in the judicial enforcement of rights.¹⁵ Fed. R. Civ. P. 1 provides that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every [civil] action." Rule 68, whose purpose was ignored by the court below, encourages settlements and thereby avoids unnecessarily protracted litigation by providing a realistic deterrent that compels offerees to consider seriously good faith offers of judgment. *Delta Air Lines*, 450 U.S. at 352 & n.8, 363 (Powell, J., concurring); *id.* at 379-380 (Rehnquist, J., dissenting); Fed. R. Civ. P. 68 advisory committee note, 28 U.S.C. App. at 637; 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3001, at 56 (1973). There can be no dispute over the importance and desirability of this goal. As Justice Powell explained in a similar context in his concurring opinion in *Delta Air Lines*, 450 U.S. at 363-364 (footnote and citation omitted):

Title VII's fee provision [identical to Section 1988] was designed to enable plaintiffs to vindicate their rights through litigation. * * * On the other hand, parties to litigation and the public as a whole have an interest—often an overriding one—in settlement

¹⁵ The House Report explains that Congress rejected the option of making awards of attorneys' fees mandatory for any prevailing party and instead deliberately chose "the more moderate approach" of leaving awards to the discretion of the courts in order to prevent abuses by plaintiffs and their lawyers. H.R. Rep. 94-1558, *supra*, at 5-6, 8; see also 122 Cong. Rec. 31832 (1976) (remarks of Sen. Abourezk). Rule 68 is simply another measure that aims to achieve precisely this same goal.

rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits. The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.

* * * It therefore seems clear that the relevant interests—of both parties and the public—will be served by construing Title VII and Rule 68 in accordance with their plain language.

This is no less true with respect to Section 1988. The purpose of Rule 68 dictates a construction that will operate, to the greatest extent possible, to provide a realistic deterrent to continued litigation so that offerees will seriously consider good faith offers of judgment.¹⁶ This is especially true in actions such as this one, in which respondent persisted in pressing a claim for \$3,500,000 in damages—a claim that bore no relationship to a realistic evaluation of the value of the case, ultimately de-

¹⁶ As a reason for refusing to apply Rule 68 to this case, the court of appeals observed that lawyers would "have to think very hard" before rejecting an offer, even if they initially considered it inadequate, because they would know that a mistake could cost them a lot of money (Pet. App. A8). Such increased consideration is the precise purpose of Rule 68, and serious thought about a serious offer should not be rejected as harmful.

The court also expressed concern that a Rule 68 offer of judgment made immediately after the filing of the complaint might deter a plaintiff's lawyers from conducting any discovery (Pet. App. A8-A9). The court's fears seem exaggerated. Before filing suit, a plaintiff's lawyers should have sufficient information to permit evaluation of an early offer of judgment.

In any event, the fact that an offer may be made before discovery is not all that significant. True, discovery may reveal information that strengthens a plaintiff's case, but it may also destroy it. There is no particular reason to think that discovery is of more benefit to one side than to the other.

terminated by a jury to be \$60,000. Congress's intent to facilitate the bringing of meritorious civil rights cases, manifested in the enactment of Section 1988, certainly does not mean that Congress also intended to promote full-blown litigation of every such claim even in the face of reasonable settlement offers. See S. Rep. 94-1011, *supra*, at 5 ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."). This Court likewise has recognized the desirability of settling civil rights claims. See *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance [are] * * * the preferred means" for achieving compliance with Title VII).

In addition to ignoring Rule 68's goal of promoting settlements, the court of appeals failed to consider the equities from a defendant's perspective. As this Court has recognized, Rule 68 incorporates elementary principles of fairness (*Delta Air Lines*, 450 U.S. at 356):

If a plaintiff chooses to reject a reasonable offer, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered.

Although the Court in *Delta Air Lines* did not address itself to attorneys' fees, the equitable considerations are at least as strong in the case of fees as in the case of more traditional "costs." That is particularly the case here, where respondent's rejection of petitioners' reasonable offer of judgment led to the expenditure of an additional \$171,000. Respondent was of course free to gamble that he would do better before a jury than by accepting petitioners' offer, but it is hardly fair to expect petitioners to bankroll the exercise of respondent's mistaken judgment.

In sum, the court of appeals went astray in its analysis of the relevant policy considerations. As Justice Powell observed in his concurring opinion in *Delta Air Lines*, 450 U.S. at 363-364, the goals of Rule 68 and civil rights fee-shifting statutes can be easily harmonized. Indeed, those goals are virtually identical: to create an incentive structure that will lead to the optimal level of litigation, encouraging meritorious and discouraging pointless litigation. It is thoroughly appropriate, therefore, to read Rule 68 and Section 1988 together.

2. The court of appeals' policy analysis also is inconsistent with this Court's approach to Section 1988 as set forth in *Hensley v. Eckerhart*, No. 81-1244 (May 16, 1983). In examining the reasonableness of attorneys' fees awarded under Section 1988, the Court in *Hensley* held that the amount of fees recoverable is dependent, to a very large extent, on the degree of success obtained. Slip op. 9-12. "[E]xcellent results" ordinarily should result in the award of a fully compensatory fee, but "partial or limited success" may well mandate a reduction in the fee award. Slip op. 11.

Generally, as the Court recognized, "[t]here is no precise rule or formula" for determining reasonable attorneys' fees under Section 1988. *Hensley*, slip op. 12. In the instant case, however, a well-established rule having the force of a statute (see *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941)) prescribes precisely, by a procedure equitable to the parties and beneficial to the judicial system, the equation for ensuring that the amount of fees awarded to a prevailing plaintiff bears a reasonable relationship to the degree of success achieved. Under Rule 68, a party who prevails but obtains a final judgment less favorable than a previous offer of judgment receives an award of attorneys' fees for his counsel's pre-offer work; this ensures compensation for all work that produced the offer. Work done after rejection of the offer, on the other hand, produced no additional benefits, and the offeree should not be permitted to recover his

fees from the offeror who has made a reasonable effort to end the litigation before additional costs are incurred. This result is fully consistent with *Hensley*, which clearly establishes that Section 1988 does not authorize fee awards for unproductive work. Slip op. 9. See also *Smith v. Robinson*, No. 82-2120 (July 5, 1984), slip op. 13 ("Due regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also to the relationship between the claims on which effort was expended and the ultimate relief obtained."); *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, 607-608 (7th Cir. 1982) (no fees awarded because plaintiff refused to accept reasonable settlement); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (no fee award for non-productive time).

B. Construing "Costs" Under Rule 68 As Encompassing Attorneys' Fees Under Section 1988 Does Not Render Rule 68 Invalid Under The Rules Enabling Act

The court of appeals also held that its interpretation of Rule 68 was required by the Rules Enabling Act, 28 U.S.C. 2072. That Act, which delegates authority to this Court to make rules governing the "practice and procedure" of the federal courts, provides, in pertinent part, that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." In a short, enigmatic discussion, the court of appeals reasoned that the right to attorneys' fees created by Section 1988 is more "procedural" than "substantive" in some senses, more "substantive" than "procedural" in other senses, and both "substantive" and "procedural" in reality before finally concluding that "[f]or present purposes it is substantive." Pet. App. A9. The right established in Section 1988 is a "substantive" one, according to the court of appeals, because rather than "mak[ing] the litigation process more accurate and efficient for both parties * * * it is designed instead to achieve a sub-

stantive objective—compliance with the civil rights laws." Pet. App. A9. Thus, the court concluded that the Rules Enabling Act requires the imposition of a limitation on the ordinary operation of Rule 68 in order to avoid interference with the "substantive right" to attorneys' fees. The court's analysis misconstrues the meaning of the Rules Enabling Act, the status of the rules promulgated pursuant thereto, and the proper construction of the rules in the light of other federal statutes.

The validity of any particular application of a federal rule turns on a proper understanding of the meaning of the phrase "substantive right" as employed in the Rules Enabling Act. The lower court interpreted "substantive" in Section 2072 in contradistinction to "procedural." This is the result of that court's misinterpretation of a series of decisions in which this Court relied on the substance/procedure dichotomy. See, e.g., *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). See generally, Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 718-738 (1974). All of these cases were diversity suits in which the issue was whether the federal rule altered a state law. The Court's concern with protecting state substantive law from encroachment by the federal judiciary—whether in the guise of judicially created federal common-law or judicial exercises of delegated authority from Congress—was apparent.¹⁷ In *Sibbach*, for example, the Court concluded that Section 2072 was to be interpreted under *Erie's* substance/procedure rubric because Congress "has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state * * * ."

¹⁷ The Rules Enabling Act was passed in 1934, but the first rules were not promulgated until 1938, the same year that the Court decided *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The first case in which the Court was called upon to interpret Section 2072—*Sibbach*—arose a scant three years later.

On the contrary it has enacted that the state law shall be the rule of decision in the federal courts" (312 U.S. at 10 (emphasis added; footnote omitted)). See also *Ragan*, 337 U.S. at 533-534 (Fed. R. Civ. P. 3, which tolls statutes of limitations upon the filing of the complaint in nondiversity suits, cannot be so applied in diversity suits because "the principle of *Erie R. Co. v. Tompkins*" demands that state law be applied).

Whether or not it is appropriate in diversity cases to construe Section 2072 in light of the substance/procedure dichotomy deriving from *Erie*,¹⁸ it is manifestly clear

¹⁸ The Court has subsequently repudiated the use of *Erie*'s substance/procedure dichotomy even in the diversity context as the test for determining the validity of federal rules under the Rules Enabling Act. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 747-753 (1980); *Hanna v. Plumer*, 380 U.S. 460, 469-474 (1965); Ely, *supra*, 87 Harv. L. Rev. at 718-738. In its place, the Court has held that where there is a "direct collision" between a federal rule and state law, the test is "whether the Rule [is] within the scope of the Rules Enabling Act * * *, and if so, within a constitutional grant of power." *Walker*, 446 U.S. at 748; *Hanna*, 380 U.S. at 470-472. As the Court explained in *Sibbach*, 312 U.S. at 14, whether a rule is within the scope of the Rules Enabling Act depends upon:

whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

So long as a federal rule *does* regulate procedure, it is valid, whether or not it affects substantive rights. See *Hanna*, 380 U.S. at 464-474; *Murphree*, 326 U.S. at 445-446; *Sibbach*, 312 U.S. at 14. Thus, analysis premised upon the distinction between substance and procedure has been abandoned for a test that focuses on procedure alone. That test does not even remotely resemble the test under *Erie* or *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (outcome-determinativeness test for substance/procedure) (cited by the court below at Pet. App. A9). So long as a rule governs "practice and procedure" (28 U.S.C. 2072), it is valid. See also *Hanna*, 380 U.S. at 476 (Harlan, J., concurring) (labeling the new approach the "arguably procedural" test).

This test results from the interaction between the constitutional policies of federal supremacy and federalism. In *Hanna*, 380 U.S. at 471-472 (footnote omitted), the Court explained:

that this approach is inapplicable when, as in the instant case, suit is brought under federal law. The federalism concerns that animated the diversity cases and gave rise to the elusive substance/procedure dichotomy no longer exist when a federal rule is challenged because it "abridge[s], enlarge[s] or modif[ies]" a *federally* created "substantive right." Instead, in the federal question context, the phrase "substantive right" in Section 2072 refers to the allocation of authority between Congress and the Court.¹⁹

We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in * * * the Constitution; in such areas state law must govern because there can be no other law. But the opinion in *Erie* * * * involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense * * *. [T]he constitutional provision for a federal court system * * * carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

The foregoing analysis has no logical applicability when the conflict is not between state law and a federal rule, but between federal law and a federal rule. Such conflicts raise questions of congressional delegation and statutory construction. Thus, the United States does not ask this Court to uphold the application of Rule 68 in this case under the test of *Hanna* and *Walker*. We note, however, that under that test, it is obvious that the court of appeals erred in not applying Rule 68 to bar recovery of respondent's post-offer attorneys' fees. Clearly, Rule 68 "really regulates procedure" within the meaning of Section 2072. See page 27 note 21, *infra*. Under the diversity cases discussed above, the reference to "substantive right[s]" in Section 2072 is inapplicable where this is the case. See *Hanna*, 380 U.S. at 472; *Sibbach*, 312 U.S. at 14; Ely, *supra*, 87 Harv. L. Rev. at 718-720.

¹⁹ The legislative history of the Rules Enabling Act supports this construction of Section 2072. Although the debates and legislative reports pertaining to the statute as finally enacted are sparse and

Because, when it promulgates rules pursuant to Section 2072, the Court exercises power delegated to it by Congress, a two-step inquiry is called for in judging a rule's validity. First, does the Constitution permit Congress to delegate to the Court authority to enact the particular rule? Second, if the answer is affirmative, has Congress in fact delegated the necessary authority? The second step is one of statutory construction²⁰ and

uninformative, see Burbank, *The Rules Enabling Act*, 130 U. Pa. L. Rev. 1015, 1096-1097 (1982); see also S. Rep. 1049, 73d Cong., 2d Sess. (1934); H.R. Rep. 1829, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9363, 10866 (1934), the Rules Enabling Act was originally proposed, in virtually identical form, in 1926, and again in 1928. See S. 477, 69th Cong., 1st Sess. (1926); S. 759, 70th Cong., 1st Sess. (1928). The legislative materials from these earlier attempts clearly reveal that Congress, in referring to "substantive right[s]," sought only to make clear its intention in the delegation to the Court contained in the Act's first sentence: that the Rules Enabling Act vested in the Court as much authority to make rules as the Constitution permits, but no more. See S. Rep. 1174, 69th Cong., 1st Sess. 9-16 (1926) (report accompanying S. 477); S. Rep. 440 (Pt. 2), 70th Cong., 1st Sess. 16-17 (1928) (report accompanying S. 759). For an exhaustive consideration of this generally ignored, pre-1934 legislative history, see Burbank, *supra*, 130 U. Pa. L. Rev. at 1035-1113.

That Congress was concerned with the limits of its power to delegate authority rather than with protecting state law from federal encroachment is not surprising. In 1934, *Erie* was four years away, and in the 1920's, when most of the Rules Enabling Act debate took place, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), was in full bloom. The question of congressional authority to delegate responsibility to other branches of government, on the other hand, was extremely controversial. See, e.g., R. Jackson, *The Struggle for Judicial Supremacy* (1941).

²⁰ This Court has never decided a case concerning the meaning of the Rules Enabling Act in a nondiversity context. Lower courts that have construed Section 2072 in federal question cases, however, have uniformly treated the issue as one of statutory construction. See *Brennan v. Silvergate District Lodge No. 50*, 503 F.2d 800, 804-805 (9th Cir. 1974); *United States v. Gustin-Bacon Division*, 426 F.2d 539, 542-543 (10th Cir.), cert. denied, 400 U.S. 832 (1970); 7 (Pt. 2) J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 86.04[4] (2d ed. 1984).

requires both that the rule be within the terms of the Rules Enabling Act and that Congress not have exercised its unquestioned authority, see *Sibbach*, 312 U.S. at 14-15; *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825); *United States v. Gustin-Bacon Division*, 426 F.2d 539, 542 (10th Cir.), cert. denied, 400 U.S. 832 (1970), to overrule the Court.

Neither the parties to this lawsuit nor the court below have questioned the constitutionality of Rule 68 as an exercise of delegated authority pursuant to Section 2072, even when attorneys' fees are placed within the larger set of "costs."²¹ Moreover, as we have argued above, Rule 68 was approved by Congress with the understanding that it would incorporate the definition of costs contained in the statute underlying the motion for attorneys' fees. See pages 9-10 & note 4, *supra*. The only remaining question, therefore, is whether, in enacting Section 1988, Congress intended an implied, partial repeal of Rule 68 in civil rights cases.

The Federal Rules of Civil Procedure have the force of statutes. *Sibbach*, 312 U.S. at 13; 7 (Pt. 2) J. Moore,

²¹ There is no question that Rule 68 is, in fact, constitutional. Congress may delegate to the Court authority "to regulate the practice of the court and to facilitate the transaction of its business." *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924). This is so even though the delegation is of powers "which the legislature may rightfully exercise itself." *Wayman*, 23 U.S. (10 Wheat.) at 19. The allocation of costs and attorneys' fees is a tool that affects the judicial process, not the underlying sources of substantive rights upon which the parties base their claims. *White v. New Hampshire Dep't of Employment Security*, 455 U.S. at 451-452 (attorneys' fee awards are "not compensation for the injury giving rise to an action" and are "uniquely separable from the cause of action to be proved at trial"); see also *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980); *Hutto v. Finney*, 437 U.S. at 691, 695 n.24; *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939). Consequently, cost and fee-shifting rules govern the practice and procedure of courts and are within the power of Congress under the Constitution to delegate to the Court. See also *Alyeska*, 421 U.S. at 262 (Congress may authorize fee-shifting at discretion of courts).

J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 69.04 (2d ed. 1984). A strong presumption exists in favor of the Rules' validity. *Hanna*, 380 U.S. at 471, 473; *H.F.G. Co. v. Pioneer Pub. Co.*, 162 F.2d 536, 539 (7th Cir. 1947); *Helms v. Richmond Petersburg Turnpike Auth.*, 52 F.R.D. 530, 531 (E.D. Va. 1971); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4508, at 133 (1982). Repugnancy of a later-enacted statute to a federal rule is not to be lightly inferred. *Weiss v. Temporary Investment Fund, Inc.*, 692 F.2d 928, 936 (3d Cir. 1982); see also *Gustin-Bacon Division*, 426 F.2d at 542; 7 (Pt. 2) *Moore's Federal Practice, supra*, ¶ 86.04[4] ("[A] subsequently enacted statute should be so construed as to harmonize with the Federal Rules if that is at all feasible."). Rather, absent "the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure," *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979), a federal statute is assumed not to alter the operation of the Federal Rules of Civil Procedure. See also *Weiss*, 692 F.2d at 936 ("abrogation" of a rule is "inappropriate" absent a "clear expression of congressional intent"); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1134-1135 n.50 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1980) ("Congressional intent to repeal a federal rule must be clearly expressed before the courts will find such a repeal."); *Brennan*, 503 F.2d at 804-805; *Gustin-Bacon Division*, 426 F.2d at 542.

The court of appeals did not find any "clear expression of congressional intent" to exempt fee applications filed under Section 1988 from the normal operation of Rule 68. The lower court merely *inferred* such an intention from the policy behind Section 1988 "to encourage the bringing of meritorious civil rights actions" and to further "compliance with the civil rights laws" (Pet. App. A8, A9). Implied repeals are strongly disfavored,

however, and are found only when two acts are in irreconcilable conflict or when a later act covers the whole subject of an earlier one and is clearly intended as a substitute; and, even then, "the intention of the legislature to repeal must be clear and manifest" *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 787-788 (1981) (citing cases). This policy against implied repeals applies *a fortiori* in considering the effect of Section 1988 on Rule 68 in light of the strong presumption in favor of the validity of the Federal Rules. The court of appeals thus clearly erred in holding that the Rules Enabling Act presents any obstacle to the normal operation of Rule 68 in the circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

This appendix lists all the federal attorneys' fee statutes currently in force that our research has disclosed. The statutes are broken down into two large groups: those that award attorneys' fees as costs and those that do not. Within each of these two groups, the statutes are broken down further according to the verbal formulation used by Congress. Within each of these groups, the statutes are broken down yet again by year of enactment: those enacted contemporaneously or prior to the promulgation of Fed. R. Civ. P. 68 are set apart from more recent enactments. Statutes are listed by popular name and by location in the United States Code.

The appendix reveals that Congress favors awarding attorneys' fees as costs. Ninety-one of the 141 statutes we have found award fees as part of the costs of litigation. Of the statutes currently in force that were enacted prior to 1938, 19 of 25 award fees as costs. It should be noted that these figures do not include statutes that have been repealed and are no longer found in the United States Code.

**I. STATUTES AWARDING ATTORNEYS' FEES
AS PART OF THE COSTS**

*Statutory formula—
"Attorney's fees as part of the costs"*

Enacted prior to 1938

Copyright Act of 1909, 17 U.S.C. 40 (now codified at 17 U.S.C. 505)

Enacted subsequent to 1938

Agricultural Fair Practices Act of 1967, 7 U.S.C. 2305(a) and (c)

Education Amendments of 1972, 20 U.S.C. (1976 ed.) 1617

Jury System Improvements Act of 1978, 28 U.S.C. 1875(d) (2)
 Rehabilitation Act of 1973, 29 U.S.C. 794a(b)
 Voting Rights Act of 1965, 42 U.S.C. 1973l(e) (as amended in 1975)
 The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. (Supp. V) 1988
 Civil Rights of Institutionalized Persons Act, 42 U.S.C. (Supp. V) 1997c(d)
 Civil Rights Act of 1964, Tit. II, 42 U.S.C. 2000a-3(b)
 Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-5(k)

Statutory formula—

"Attorneys' fees to be taxed and collected as part of the costs"

Enacted prior to 1938

Packers and Stockyards Act of 1921, 7 U.S.C. 210(f)
 Perishable Agricultural Commodities Act of 1930, 7 U.S.C. 499g(b) (as amended in 1937)
 Railway Labor Act of 1926, 45 U.S.C. 153
 Shipping Act of 1916, 46 U.S.C. 829
 Communications Act of 1934, 47 U.S.C. 206
 Communications Act of 1934, 47 U.S.C. 407
 Interstate Commerce Act, 1887, 49 U.S.C. 8
 Interstate Commerce Act, 1887, 49 U.S.C. 16
 Interstate Commerce Act, 1887, 49 U.S.C. 908(b) and (e)

Enacted subsequent to 1938

Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11705(d) (3)
 Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11710(b)

Statutory formula—
"Costs(including attorneys' fees)"

Enacted Prior to 1938

Perishable Agricultural Commodities Act of 1930, 7 U.S.C. 499f(e)
 Clayton Antitrust Act, 15 U.S.C. 15
 Unfair Competition Act, 1916, 15 U.S.C. 72
 Securities Act of 1933, 15 U.S.C. 77k(e)
 Securities Exchange Act of 1934, 15 U.S.C. 78i(e)
 Securities Exchange Act of 1934, 15 U.S.C. 78r(a)
 Indian General Allotment Act, 1887, 25 U.S.C. 331
 Merchant Marine Act of 1936, 46 U.S.C. 1227

Enacted subsequent to 1938

Ethics in Government Act of 1978, 2 U.S.C. 288i(d)
 Commodity Exchange Act, 7 U.S.C. 18(c), (d) and (e) (added in 1983)
 Home Owners' Loan Act of 1933, 12 U.S.C. 1464(q) (3) (added in 1982)
 Bank Holding Company Act Amendments of 1970, 12 U.S.C. 1975
 Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c(a) (2)
 Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 26
 Trust Indenture Act, 1939, 15 U.S.C. 77ooo(e)
 Trust Indenture Act, 1939, 15 U.S.C. 77www(a)
 Act of July 31, 1970, 15 U.S.C. 298(b), (c) and (d)
 Consumer Product Safety Act, 15 U.S.C. 2060(c)
 Consumer Product Safety Act, 15 U.S.C. 2072(a) and (b)
 Consumer Product Safety Act, 15 U.S.C. 2073
 Hobby Protection Act, 15 U.S.C. 2102
 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2310(d)

Toxic Substances Control Act, 15 U.S.C. 2622(b) (2) (B)
 Export Trading Company Act of 1982, 15 U.S.C. 4016(b)
 Endangered Species Act of 1973, 16 U.S.C. 1540(g) (4)
 Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c)
 Act of Oct. 1, 1965, 25 U.S.C. 565c
 Act of Oct. 1, 1965, 25 U.S.C. 565d
 Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1451(e)
 Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1427(c)
 Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (3)
 Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(b)
 Federal Mine Safety and Health Act of 1977, 30 U.S.C. 938(c)
 Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(d)
 Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275(c)
 Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1293(c)
 Federal Water Pollution Control Act, 33 U.S.C. 1367(c)
 Federal Water Pollution Control Act, 33 U.S.C. 1365(d)
 Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1415(g) (4)
 Act to Prevent Pollution from Ships, 33 U.S.C. 1910(d)
 Safe Drinking Water Act, 42 U.S.C. 300j-9(i) (2) (B) (ii)
 Safe Drinking Water Act, 42 U.S.C. 300j-8(d)

Civil Rights Act of 1964, Tit. III, 42 U.S.C. 2000b-1
 Noise Control Act of 1972, 42 U.S.C. 4911(d)
 Act of Nov. 6, 1978, 42 U.S.C. (Supp. V) 5851(e) (2)
 Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. (Supp. V) 6104(e) (1)
 Energy Policy and Conservation Act, 42 U.S.C. 6305(d)
 Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6971(c)
 Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. V) 6972(e)
 Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7413(b)
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 Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7622(b) (2) (B)
 Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. V) 8435(d)
 Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9610(c)
 Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. V) 1349(a) (5)
 Rail Transportation Improvement Act, 45 U.S.C. 854(g)
 Act of Sept. 14, 1973, 47 U.S.C. (Supp. V 1975) 331(b) (repealed in 1975)
 Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. (Supp. V) 2014(e)

**Statutory formula—
“Attorneys’ fees and other litigation costs”**

Enacted prior to 1938

None

Enacted Subsequent to 1938

Freedom of Information Act, 5 U.S.C. 552(a) (4) (E) and (F)
 Privacy Act of 1974, 5 U.S.C. 552a(g) (2) (B), (3) (B)
 Government in the Sunshine Act, 5 U.S.C. 552b(i)
 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 57a(h) (1)
 Toxic Substances Control Act, 15 U.S.C. 2605(c) (4) (A)
 National Historic Preservation Act Amendments of 1980, 16 U.S.C. 470w-4
 Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 825q-1(b) (2)
 Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2520
 Act of Sept. 21, 1968, 25 U.S.C. 788f
 Privacy Protection Act of 1980, 42 U.S.C. (Supp. V) 2000aa-6(f)
 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1810(c)

**Statutory formula—
“Costs other than attorneys’ fees”**

Enacted Prior to 1938

Act of May 18, 1928, 25 U.S.C. 655

Enacted Subsequent to 1938

None

**II. STATUTES AWARDING ATTORNEYS’ FEES
AND COSTS AS SEPARATE ITEMS**

**Statutory formula—
“Costs and a reasonable attorney’s fee” or
“costs together with a reasonable attorney’s fee”**

Enacted prior to 1938

Norris-La Guardia Act, 29 U.S.C. 107
 Fair Labor Standards Act of 1938, 29 U.S.C. 216
 Interstate Commerce Act, 49 U.S.C. 322(b)
 Interstate Commerce Act, 49 U.S.C. 1017(b)

Enacted Subsequent to 1938

Act of Sept. 6, 1966, 5 U.S.C. 8132
 Federal Crop Insurance Act, 7 U.S.C. 1507(c) (added in 1980)
 Housing Act of 1959, 12 U.S.C. 1715u(b) (1)
 Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2607(d) (2)
 Right to Financial Privacy Act of 1978, 12 U.S.C. 3417(a) (4)
 Right to Financial Privacy Act of 1978, 12 U.S.C. 3418
 Securities Exchange Act of 1934, 15 U.S.C. 78u(h) (added in 1980)
 National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1400(a)
 Consumer Credit Protection Act, 15 U.S.C. 1681n (3)
 Consumer Credit Protection Act, 15 U.S.C. 1681o (2)
 Consumer Credit Protection Act, 15 U.S.C. 1691e (d)
 Consumer Credit Protection Act, 15 U.S.C. 1692k (a)
 Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1918(a)

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1989 (a) (2)
 Alaska National Interest Lands Conservation Act, 16 U.S.C. 3117 (a)
 Welfare and Pension Plans Disclosure Act, 29 U.S.C. (1970 ed.) 308 (c)
 Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431 (c)
 Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132 (g) (1)
 Multiple Mineral Development Act, 30 U.S.C. 526 (e)
 Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9612 (c)
 National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. (& Supp. V) 5412 (b)
 Alaska National Interest Lands Conservation Act, 43 U.S.C. (Supp. V) 1631 (c)
 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1810 (c)

Statutory formula—

Statutes listing costs and attorneys' fees separately

Enacted Prior to 1938

Act of Feb. 26, 1853, 28 U.S.C. 1927
 Act of Mar. 3, 1887, 48 U.S.C. 1506 (added in 1897)

Enacted Subsequent to 1938

Bankruptcy Act of 1978, 11 U.S.C. 303 (i)
 Bankruptcy Act of 1978, 11 U.S.C. 363 (n)
 Bankruptcy Act of 1978, 11 U.S.C. 523 (d)
 Housing Act of 1961, 12 U.S.C. 1715k (h) (6)
 Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1709 (c)

Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. 3608 (d)
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 Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2632 (a) and (b)
 Act of Dec. 22, 1974, 25 U.S.C. 640d-27 (a) and (b)
 Act of Oct. 14, 1966, 25 U.S.C. 1102
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 Act of Sept. 21, 1968, 25 U.S.C. 1183
 Act of Mar. 18, 1972, 25 U.S.C. 1261
 Act of Oct. 6, 1972, 25 U.S.C. 1300
 Act of Oct. 25, 1972, 25 U.S.C. 1300d
 Tax Reduction and Simplification Act of 1977, 42 U.S.C. (Supp. V) 662 (b)
 Atomic Energy Act of 1954, 42 U.S.C. 2184
 Fair Housing Act of 1968, 42 U.S.C. 3612 (c)
 Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. V) 1818 (c) (1) (C)
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No. 83-1437 ⁽⁸⁾

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

- v. -

ALFRED W. CHESNY,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit

BRIEF FOR AMICUS CURIAE
THE CITY OF NEW YORK

IN SUPPORT OF REVERSAL

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No. 83-1437

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

- v. -

ALFRED W. CHESNY,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit

BRIEF FOR AMICUS CURIAE
THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of reversal of the judgment of the Seventh Circuit. As a consequence of the explosive growth

in the number of actions against the City and its employees pursuant to 42 U.S.C., section 1983,* the outcome of this case will have a significant impact upon the City. Maintaining that Rule 68 operates to preclude a civil rights plaintiff from recovering his own attorney's fees accrued following an unbeaten settlement offer, the City has utilized the rule in efforts to reach reasonable settlements early in litigation.** In Lyons v. Cunningham, 583 F. Supp.

*While specific data concerning the increase in civil rights suits against the City is not available, an increase can be inferred from nationwide statistics. The number of such suits increased from 7,679 in 1973 to 19,735 in 1983 (excluding state prisoner actions). See Annual Report of the Director of Administrative Office of the United States Courts, 1980 (Table 28); 1983 (Table 25).

**A determination that attorney's fees are "part of the costs" for purposes of Rule 68 does not compel the conclusion that a prevailing plaintiff who fails to obtain a judgment greater than a Rule 68 offer must pay the defendant's fees accrued after the offer. An unbeaten Rule 68 offer has the effect of mandatorily shifting to the plaintiff the defendant's costs. Fees, however, are a portion of the costs award which, by statute and case law, are always awarded at the discretion of the court. Thus, before a court could award fees to a defendant after an

(Footnote continued on next page)

1147 (S.D.N.Y. 1983), the District Court accepted the City's position, holding that the plaintiff was not entitled to obtain his attorney's fees pursuant to 42 U.S.C., section 1988, accrued subsequent to the City's Rule 68 offer of judgment. That case has been appealed to the United States Court of Appeals for the Second Circuit, which, with the consent of the parties, has adjourned the appeal pending this Court's resolution of the instant case.

(Footnote continued from previous page)

unbeaten Rule 68 offer, it would be required to find that the plaintiff's action was "unreasonable, frivolous, meritless or brought for a vexatious purpose." Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). Since Rule 68 itself comes into play only when there is a plaintiff's verdict for less than the amount of the offer (see Delta Air Lines, Inc. v. August, 450 U.S. 346 [1981]), the fee component of the defendant's costs would be shifted to the plaintiff only under the rare circumstances where the plaintiff's claim was "unreasonable, frivolous, meritless or brought for an improper purpose," but the plaintiff nonetheless prevailed. This is essentially the position taken by the District Court in Bitsouni v. Sheraton-Hartford Corp., 33 F.E.P. Cases 898 (D. Conn. 1983). See also Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L.J. 889, 900.

It is our position that unless Rule 68, consistent with its purpose and intent, is held to limit attorney's fees as well as other costs in civil rights actions, it will have little or no impact and will lose its function of inducing early settlements. Attorneys confronted with reasonable offers will be able to ignore them, knowing that their fees will increase with the passage of time. This will result in cases being tried which need not be tried, unnecessary congestion in the courts, and the utilization of scarce government legal resources in cases which can and should be settled.

SUMMARY OF ARGUMENT

The Court below erred in concluding that Rule 68 does not bar the recovery of attorney's fees pursuant to 42 U.S.C., section 1988, accrued after the date of an unbeaten Rule 68 offer of judgment. The Court improperly reasoned that attorney's fees are not part of the costs and mistakenly perceived a

congressional intent not to reduce fee awards in civil rights actions.

In this country, when fees have been available, they have generally been awarded by statute and case law as part of the costs. In enacting section 1988, Congress followed this long established practice and explicitly made fees recoverable "as part of the costs." This ensured that state defendants would not be immune from a fee award by virtue of the Eleventh Amendment of the United States Constitution.

In rejecting an assertion of Eleventh Amendment immunity to a fee award by state defendants, this Court in Hutto v. Finney, 437 U.S. 678 (1978), concluded that Congress intended in section 1988 to make attorney's fees recoverable as part of the costs. Subsequent to Hutto, lower courts have, in several contexts, dealt with the issue of whether fees are a part of the costs. A majority has found that fees are costs for purposes of the timing of fee applications, as part of a release of all costs,

and in interpreting the relationship of Rule 68 to a fee application pursuant to section 1988.

There is nothing in the legislative history of section 1988 to indicate that Congress intended anything other than what it explicitly stated, i.e., allowing the prevailing party a reasonable attorney's fee "as part of the costs." Since Rule 68 had been part of the Federal Rules of Civil Procedure long before the enactment of section 1988, and given the significant public policy served by the Rule, it must be assumed, in the absence of clear legislative history to the contrary, that Congress determined not to exempt fee awards in civil rights cases from the provisions of the Rule. It follows that a civil rights plaintiff is barred from recovering his attorney's fees accrued after an unbeaten Rule 68 offer of judgment.

ARGUMENT

THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ATTORNEYS FEES ACT OF 1976, 42 U.S.C., SECTION 1988, INDICATES THAT CONGRESS MADE ATTORNEY'S FEES A PART OF THE COSTS IN CIVIL RIGHTS ACTIONS FOR ALL PURPOSES. THEREFORE, RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE BARS A PLAINTIFF FROM RECOVERING ATTORNEY'S FEES ACCRUED AFTER AN UNBEATEN OFFER OF SETTLEMENT MADE PURSUANT TO THE RULE.

When Congress enacted the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C., section 1988 ("section 1988"), it specifically provided that a reasonable attorney's fee would be available to the prevailing party "as part of the costs." Congress' choice of that formulation was not accidental. Rather, Congress was acting in an historical context in which statutory provisions for attorney's fees were customarily made as part of the costs. Also, Congress intended to make fee awards applicable to state defendants that might otherwise be immune from a money damage award by virtue of the

Eleventh Amendment of the United States Constitution.

Rule 68 has been included in the Federal Rules of Civil Procedure since 1938, and Congress was presumably aware of its existence at the time that section 1988 was passed. The legislative history of section 1988 demonstrates that Congress intended to make fees a "part of the costs" for all purposes. Thus, even in civil rights cases, Rule 68, by its terms, applies to attorney's fees and acts as a bar to their recovery in the appropriate circumstances.

A. Awards of Attorney's Fees Prior to Section 1988

Unlike England, where counsel fees have long been awarded to the successful litigant, the "American Rule" has been that the prevailing party does not usually recover his attorney's fees. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). When fees have been allowed in this

country, whether by statute or case law, they have almost always been awarded as part of the costs.

In 1793, Congress enacted provisions allowing for an award of attorney's fees to the prevailing party as part of the costs in the federal courts. Act of March 1, 1793, 2nd Cong., 2nd Sess., ch. XX, 1 Stat. 332, §§1, 4. This act was allowed to expire in 1799, but the federal courts continued to award attorney's fees as part of costs where they were recoverable under state rules. In 1853, Congress acted to make the award of costs uniform nationally and to eliminate fee awards. Act of Feb. 26, 1853, 32nd Cong., 1st Sess., 10 Stat. 161. This Court consistently interpreted the 1853 act as having terminated the ability of the winner to recover attorney's fees as part of the costs from the losing party. See Flanders v. Tweed, 82 U.S. (15 Wall.) 450, 452-53 (1872); The Baltimore, 75 U.S. (8 Wall.) 377 (1869).

Without changing the American rule, Congress, over the next 120 years, did, however, allow for attorney's fees under a multitude of

statutes, and, when it did, it generally provided for fees to be recovered as part of costs. In the House debates over section 1988, Congressman Drinan included a list of 55 federal statutes which authorized the award of attorney's fees. 122 Cong. Rec. 35123 (1976). In 36 of those statutes, Congress provided for recovery of attorney's fees "as part of the costs." E.g., 7 U.S.C., §2305(a) (Agricultural Unfair Trade Practices Act); 42 U.S.C., §2000a-3(b) (Title II of the Civil Rights Act of 1964); 20 U.S.C., §1617 (Education Amendments of 1972); see also, e.g., 12 U.S.C., §1975 (Bank Holding Company Act); 15 U.S.C., §15 (Clayton Act); 18 U.S.C., §1964(c) (Organized Crime Control Act of 1970); 33 U.S.C., §1365(d) (Water Pollution Prevention and Control Act); 42 U.S.C., §300j-8(d) (Safe Drinking Water Act) (recovery of "the costs of the suit including reasonable attorney's fees" or similar language); 7 U.S.C., §210(f) (The Packers and Stockyard Act); 15 U.S.C., §77(k) (Securities Act of 1933); 47 U.S.C., §206 (Communications Act of 1934) (fees "taxed

and collected as part of the costs in the case" or similar language).

Most of these statutes did not generate much attorney's fees litigation. One statute which did was the Clayton Act, 15 U.S.C., §12, et seq., and court decisions under it were consistent with the legislative intent to make the fee award part of the costs. See, e.g., Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir. 1982); Baughman v. Cooper Jarrett, Inc., 530 F.2d 529 (3rd Cir. 1976), cert. denied sub. nom. Wilson Freight Forwarding Co., AKA Wilson Freight Co. v. Baughman, 429 U.S. 825 (1976); Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2d 190, 222 (9th Cir. 1964).

In addition to the specific statutory provisions for the recovery of attorney's fees, exceptions to the American rule were created by case law. For example, beginning in the early 1970's, the federal courts began to award fees in "private attorney general" cases, i.e., cases in which private individuals brought suit to vindicate public interests.

The courts took the position that, even absent specific statutory authority, they had the power under their equitable jurisdiction to award fees. Significantly, when the courts elected to award fees, they did so generally as part of the costs. One court described an award of costs as "analytically indistinguishable from one of attorney's fees." Class v. Norton, 505 F.2d 123, 126 (2d Cir. 1974); see also Skehan v. Board of Trustees Bloomsburg State College, 538 F.2d 53, 58 (3rd Cir. 1976); Thonen v. Jenkins, 517 F.2d 3, 7 (4th Cir. 1975); Brewer v. School Board of City of Norfolk, Virginia, 456 F.2d 943, 948 (4th Cir. 1972), cert. denied, 406 U.S. 933 (1972).

In Alyeska Pipeline Service Co. v. Wilderness Society, supra, 421 U.S. 240, this Court was confronted with the question of whether the award of such fees was permissible. After examining the history of various costs and fees statutes, the Court concluded that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation" in such a

fashion. 421 U.S. at 247. The Court, however, invited Congress to provide such legislation, and Congress accepted the invitation. See 42 U.S.C., §1988.

B. The Legislative History of the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C., Section 1988

Even before Alyeska was decided, Congress had been considering extending fee awards to the Reconstruction era civil rights statutes. Part of the purpose for doing so was to require state defendants to pay attorney's fees. Congress was concerned with this issue because there had been some question whether states and state employees could assert an Eleventh Amendment defense against fee awards. See generally Comment, Attorney's Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875 (1975).

While Congress was considering the legislation, this question was partially resolved in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), which, in

a Title VII action against a state defendant, authorized an award of attorney's fees pursuant to 42 U.S.C., section 2000e-5(k), which provided to the prevailing party "a reasonable attorney's fee as part of the costs." Two sponsors of the legislation, Senator Abourezk (see 122 Cong. Rec. 33315 [1976]) and Congressman Drinan (see 122 Cong. Rec. 35123 [1976]), and the House Report (H.R. Rep. 94-1558, 94th Cong., 2nd Sess., p. 7 n.14 [1976]) specifically referred to Fitzpatrick and to the intent of the bill to award costs against state defendants. The Senate Report was also quite specific regarding Congress' intent to ensure enforcement of the civil rights laws against the states though the award of reasonable attorney's fees as costs (S. Rep. No. 94-1011, 94th Cong., 2nd Sess., p. 5 [1976], reprinted in 1976 U.S. Code Cong. and Ad. News, 5908, 5913):

Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. §1617, the Emergency School Aid

Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases, it is intended that the attorneys' fees, like other items of costs,⁶ will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). [one footnote omitted]

⁶Fairmont Creamery Co. v. Minnesota, 275 U.S. 168 [sic. 70] (1927).

The reference to Fairmont Creamery is significant. In that case, this Court held that states had no immunity to the imposition of costs. Its inclusion in this context is a clear expression of the intent of Congress to make fees recoverable from state defendants by making them recoverable as part of the costs and thus not subject to the Eleventh Amendment's provision for immunity to money damages.

In determining that attorney's fees would be recoverable as part of the costs so as to make fee

awards effective against states and their employees, Congress presumably made them costs for all other purposes. Nowhere in the debates, the detailed House and Senate Reports or the records of the subcommittee hearings in the Senate and House which preceded enactment of section 1988 is there the slightest hint that Congress intended either to have the section take precedence over the Federal Rules or otherwise to make fees part of the costs for some purposes but not for others.

If Congress had intended to denominate attorney's fees as costs to avoid the Eleventh Amendment problem but at the same time intended to exempt fees from the provisions of the Federal Rules, that intent, we submit, would have expressed itself in the legislative history.

The portion of the legislative history of section 1988 upon which the Court below relied in support of its conclusion that Congress did not intend to have Rule 68 apply to fees was quoted out of context. In discerning a congressional intent not to have fee awards reduced, the Court quoted the

following passage from the Senate Report, supra, p. 5, 1976 U.S. Code Cong. and Ad. News at 5912 (720 F.2d at 479):

"[P]rivate attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.

However, that passage must be read in context with the language immediately following it (1976 U.S. Code Cong. and Ad. News at 5912):

Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. [citations omitted]. This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278.

It is clear that Congress was concerned with foreclosing the possibility that a plaintiff who brings a good faith civil rights action and loses might be

required to pay the defendant's attorney's fees. This is quite different from Rule 68 which merely cuts off fees accrued by the plaintiff's attorney after the plaintiff has continued to litigate despite receiving an offer larger than his ultimate recovery.*

C. Judicial Interpretation of Section 1988

In Hutto v. Finney, 437 U.S. 678 (1978), this Court rejected a state employee's claim of Eleventh Amendment immunity to a fee award. The ruling turned directly upon a finding that, pursuant to section 1988, attorney's fees had been intended by Congress to be recoverable as part of the costs. The Court noted the specific references in the legislative history that " 'fees, like other items of costs,' " should be collected from the appropriate officials. 437 U.S. at 694. The Court stated (437

*See, supra, p. 2n.**.

U.S. at 695):

The Act imposes attorney's fees "as part of the costs." Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the State goes back to 1849 in this Court

Citing Fairmont Creamery Company v. Minnesota, 275 U.S. 70 (1927), the Court continued (437 U.S. at 696-98):

Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs.

There is ample precedent for Congress' decision to authorize an award of attorney's fees as an item of costs. . . . In America, although

fees are not routinely awarded, there are a large number of statutory and common-law situations in which allowable costs include counsel fees. Indeed, the federal statutory definition of costs, which was enacted before the Civil War and which remains in effect today, includes certain fixed attorney's fees as recoverable costs. In Fairmont Creamery itself, the Court awarded these statutory attorney's fees against the State of Minnesota along with other taxable costs, even though the governing statute said nothing about state liability. It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity. [footnotes omitted]

Although Hutto should have resolved the question of whether attorney's fees are part of costs, the issue reappeared in a dispute over the timing of a request for fees. The Courts of Appeals for the Fourth, Fifth, Sixth and Seventh Circuits held that since fees are by statute a "part of the costs," a fee application is an application for costs under F.R. Civ. P. 54(d) and 58, which do not provide a specific time period in which to move.

See Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981); Gary v. Spires, 634 F.2d 772, 773 (4th Cir. 1980); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980); Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980).

The Courts of Appeals for the First and Tenth Circuits held that since fees were more difficult to calculate than other costs, they could not be costs despite what Congress had provided. Fee requests, these Courts held, must therefore be made pursuant to F.R. Civ. P. 59(e) within ten days after entry of judgment. See Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981); White v. New Hampshire Department of Employment Security, 629 F.2d 697 (1st Cir. 1980), rev'd, 455 U.S. 445 (1982). The Court of Appeals for the Eighth Circuit took a third approach, finding that fee requests were governed by local rules rather than the Federal Rules. See Obin v. District No. 9, Int'l Assoc. of Machinists and Aerospace Workers, 651 F.2d 574, 582 (8th Cir. 1981).

In White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), this

Court partially resolved the issue holding that a motion for attorney's fees should not be made pursuant to Rule 59(e). However, while the Court declined to hold expressly that fee requests were motions for costs under Rules 54(d) and 58 (455 U.S. at 454 n.17), its holding is consistent with a determination that fees are part of costs, and subsequent courts have taken that position. See Spray-Rite Service Corporation v. Monsanto Company, 684 F.2d 1226, 1247-48 (7th Cir. 1982); Brown v. City of Palmetto, Georgia, 681 F.2d 1325 (11th Cir. 1982); cf. Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982); Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982) (fees are not part of "costs" as that term is used in local rules).

In another context, the Second Circuit held that a release executed by the prevailing party as to all costs was also a release of attorney's fees. Brown v. General Motors Corp., 722 F.2d 1009 (2d Cir. 1983).

Those courts which have dealt with this question in the specific context of Rule 68 have

generally found that attorney's fees are costs in that context as in others. In Fulps v. City of Springfield, Tennessee, 715 F.2d 1088, 1092-93 (6th Cir. 1983), the Court concluded:

When Congress drafted 42 U.S.C. §1988, it described attorney's fees "as a part of the costs." Congress could have simply authorized the recovery of attorney's fees, but it chose to go further and characterize the fees as costs. Required, as we are, to construe the language of a statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs. [footnote omitted]

See also Lyons v. Cunningham, 583 F. Supp. 1147 (S.D.N.Y. 1983); Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Cal. 1979); Scheriff v. Beck, 452 F. Supp. 1254 (D. Col. 1978); Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976).

Eschewing the weight of authority noted above, the Court below relied on Pigeaud v.

McLaren, 699 F.2d 401 (7th Cir. 1983), in which the plaintiff accepted an offer of one dollar "plus all costs and expenses." The offer also stated that it should not be "construed as an admission of liability." 699 F.2d at 402. The Court held that in view of the rejection of liability, the plaintiff was not a prevailing party and thus could not recover fees. It then determined that costs in the context of a Rule 68 offer did not include attorney's fees. Pigeaud, however, is not only contrary to the weight of authority, but, further, it is inconsistent with the Seventh Circuit's own earlier determinations in Spray-Rite Service Corporation v. Monsanto Company, supra, 684 F.2d at 1247-48, and Bond v. Stanton, supra, 630 F.2d at 1234, wherein the Court held that attorney's fees are costs for the purpose of the timing of fee applications.*

*The Court below also relied on Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), which involved 28 U.S.C., section 1927, a different statute. Roadway Express is discussed at length and distinguished in both petitioners' brief and the brief of amicus curiae, the State of Florida.

Pigeaud and the decision in the instant case are also inconsistent with the basic principles of statutory construction that a statute should be given its obvious and rational meaning and that it should be presumed that Congress understood the meaning of the words it used. United States v. Goldenberg, 168 U.S. 95, 103 (1897). While Congress undoubtedly has the power to exempt attorney's fees from the provisions of the Federal Rules, and specifically from Rule 68, nothing in the legislative history indicates that it chose to do so. Absent a " 'clear inconsistency' or a demonstrated congressional purpose to exclude one or more of the Federal Rules, 'a subsequently enacted statute should be construed so as to harmonize with the Federal Rules if that is at all feasible.' " Grossman v. Johnson, 674 F.2d 115, 123 (1st Cir. 1982); see also In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1134 n.50 (7th Cir. 1979); United States v. Gustin-Bacon Division, Certainteed Products Corporation, 426 F.2d 539 (10th Cir. 1970),

cert. denied, 400 U.S. 832 (1970); 7 Moore's Federal Practice, ¶ 86.04[4], p. 86-22.

We submit that when Congress elected to award fees "as part of the costs" (42 U.S.C., §1988), it meant what it said.* See Hutto v. Finney, *supra*, 437 U.S. 678. This is particularly true in the instant case. Given the significant public policy served by Rule 68 - expediting the litigation process by encouraging the settlement of cases which should be settled - any attempt to carve out an exception to its terms on the basis of subject matter must be based on the clearest expression of intent. As we have noted, such an expression is absent from the legislative history of section 1988. That history suggests, rather, that Congress intended attorney's fees to be costs for all purposes. A civil rights plaintiff, therefore, is barred from recovering fees

*Otherwise, state defendants in civil rights actions would be barred from asserting Eleventh Amendment immunity to a fee award because fees are part of costs, but would be unable to take advantage of Rule 68 because fees are not part of costs.

accrued subsequent to an unbeaten offer of judgment made pursuant to Rule 68.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED, AND THE ORDER OF THE DISTRICT COURT SHOULD BE REINSTATED.

Respectfully submitted,

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July 16, 1984.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

—v.—

ALFRED W. CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR
OF THE ESTATE OF STEVEN CHESNY, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF BY THE COMMITTEE ON THE FEDERAL
COURTS ON BEHALF OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK
AS AMICUS CURIAE SUPPORTING RESPONDENT**

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Point II

THE FUNDAMENTAL CIVIL RIGHTS POLI-
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

—v.—

ALFRED W. CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR
OF THE ESTATE OF STEVEN CHESNY, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF BY THE COMMITTEE ON THE FEDERAL
COURTS ON BEHALF OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK
AS AMICUS CURIAE SUPPORTING RESPONDENT**

Preliminary Statement

This brief is respectfully submitted by the Committee on the Federal Courts of the Association of the Bar of the City of New York (the "Association"), on behalf of the Association as *amicus curiae*, in support of affirmance of the Court of Appeals' decision below. The Association believes that the Court of Appeals correctly held that the mandatory "costs"-shifting provision of Rule 68, Fed. R. Civ. P., was not intended to deprive the District Courts of their discretion to determine the amount of a reasonable attorneys' fee under The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. (Supp. V) § 1988 ("Section 1988").

Interest of the *Amicus*

The Association was established in 1871 "for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession. . . ." (Charter, April 28, 1871). The Committee on the Federal Courts is one of the Association's standing committees. It monitors developments affecting the administration of the federal courts and develops proposals for improvements.

The Committee has recently studied Rule 68 in reviewing amendments to it proposed by the Committee on Rules of Practice and Procedure. 98 F.R.D. 339, 361-67 (1983). Those proposals would change Rule 68 by, among other things, empowering the District Courts to award attorneys' fees as well as "costs" against a litigant or defendant who rejects an offer of settlement which proves superior to the ultimate judgment. Because the power to shift fees—rather than only "costs," as at present—would substantially raise the "stakes" under Rule 68, the proposal would also eliminate the mandatory character of the present Rule; fee-shifting would be subject to consideration of various discretionary factors, to avoid what the Advisory Committee called "the Draconian impact of an 'all-or-nothing' rule." *Id.* at 365.

The Association's review of the Advisory Committee proposals gave it an opportunity to study in depth a number of the Rule 68 issues raised by the First Question Presented in the petition herein.¹ The Association believes that its views may be helpful to the Court in resolving those Rule 68 issues, and this brief is being filed with the consent of the parties.²

¹ This brief does not address, and the Association does not take a position with respect to, the Second Question Presented by the petitioners.

² The parties' letters of consent to the filing of this brief have been filed with the Clerk of this Court.

Statement of Facts³

Petitioners Marek, Wadycki and Rhode, police officers in the Village of Berkley, Illinois, shot and killed respondent's son, Steven. Respondent brought this action against the policemen, the Village, and others, under 42 U.S.C. § 1983.

Thereafter petitioners submitted an offer of judgment which offered to settle three elements of the case: liability, "costs" and attorneys' fees. The offer read:

Pursuant to Federal Rule of Civil Procedure 68, the defendants [Marek, Wadycki and Rhode] hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorneys' fees, of One Hundred Thousand (\$100,000) Dollars.

Respondent rejected the offer. The record does not reflect the reasons for respondent's rejection. There has been no judicial determination as to the reasons why the offer was rejected.

After a three-week trial, the jury returned a verdict for respondent. The jury awarded compensatory damages and punitive damages against the police officer defendants. The total amount of the verdict was \$60,000, the jury having decided not to award any amount as compensation for loss of the decedent's future earnings, notwithstanding uncontradicted expert testimony that he would have left his parents an estate having a present value in excess of \$500,000.

Pursuant to Section 1988, the District Court awarded respondent attorneys' fees of \$32,000, for legal services rendered prior to the offer of judgment. The District Court refused to consider any award of fees for services rendered after the date of the Rule 68 offer. The District Court held that Rule 68's requirement that respondent pay all "costs" incurred subsequent to rejection of the offer precluded the award of attor-

³ This Statement of Facts is based on the record and on the decisions below. They are reported at 547 F. Supp. 542 (N.D. Ill. 1982) and 720 F.2d 474 (7th Cir. 1983).

neys' fees to which respondent might otherwise have been entitled under Section 1988.⁴

The Court of Appeals for the Seventh Circuit reversed, holding that Rule 68 did not preclude an award of fees otherwise appropriate. It ordered the case remanded to the District Court for determination under Section 1988 of a reasonable fee for services rendered after the Rule 68 offer.⁵

The Court of Appeals reasoned that Rule 68 is not intended to cut off the possibility of a Section 1988 fee award. Relying upon this Court's recent decision in *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980), the Court of Appeals held that proper construction of the word "costs" depends upon the context in which the word is used.⁶ With reference to the

4 Section 1988 provides, in pertinent part:

In any action or proceeding to enforce a provision of Section 1981, 1982, 1983, 1985 and 1986 of this Title, Title 9 of Public Law 92-318, or Title 6 of the Civil Rights Act of 1964, the Court in its discretion may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

5 A threshold issue considered by the Court of Appeals was whether petitioners' offer of judgment for a liquidated sum, "including costs now accrued and attorneys' fees," was valid under Rule 68. The Court of Appeals concluded that the form of petitioners' offer was proper. The issue of the validity of the offer is not raised in the petition for certiorari. However, it may be noted that the language of the offer was directly at odds with the position petitioners now take, that "costs" includes attorneys' fees: the offer separated those two items out and treated them as if fees were *not* included in "costs." See page 3, *supra*.

6 The Court of Appeals distinguished the decision of the Court of Appeals for the Sixth Circuit in *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir. 1983). *Fulps* did not involve the issue presented here, whether a plaintiff who rejects a Rule 68 offer is barred from receiving any award for fees incurred after rejection of the offer. In *Fulps*, plaintiff had *accepted* the offer of judgment which, unlike petitioners' here, was silent on the subject of fees. The Court of Appeals for the Sixth Circuit held that the acceptance of the offer did not preclude a further application for fees by the plaintiff. Some of its reasoning towards this conclusion is contrary to that of the Court of Appeals below.

particular context in which "costs" must be construed here, the Court of Appeals reasoned that allowing the automatic, mandatory "costs"-shifting provisions of Rule 68 to be used to preclude a fee award under Section 1988 would be inconsistent with the Congressional policy underlying Section 1988, which grants the District Courts broad discretion over fee awards. The Court also noted that, if Rule 68 were construed to produce a result which would differ from that produced by Section 1988, a question of the Rule's validity might arise under the Rules Enabling Act, 28 U.S.C. § 2072.

Thereafter, before any further proceedings could be had in the District Court under Section 1988, petitioners sought review of the Rule 68 issue in this Court.

Summary of Argument

I. A. The Court of Appeals correctly held that "costs" in Rule 68 is limited to the items traditionally taxable by the clerk of the court under Rule 54(d), Fed. R. Civ. P. As this Court made clear in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), Rule 68 deters rejection of settlement offers by denial of Rule 54(d) "costs" to a prevailing plaintiff. "Costs" in Rules 54(d) and 68 was not meant to be construed one way if a fee award statute is involved and another way if one is not. The Rules themselves make no such distinction and the Federal Rules should be construed uniformly as to "every civil action." Fed. R. Civ. P. 1.

This Court's recent decision in *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980), precludes subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. *Id.* at 763. This would be the result of a reversal here: rejection of a settlement offer in a commercial case would result in the relatively modest sanction of denial of Rule 54(d) costs, while similar rejection in a civil rights action would result in a Draconian forfeiture of fees. Compare *id.* at 762-63.

Petitioners (and the Government as *amicus curiae*) confuse two different issues: whether Rule 68 precludes any award of fees after rejection of a Rule 68 offer and, on the other hand,

whether Section 1988 permits a District Court to diminish a fee award for services rendered after a reasonable settlement offer has been rejected in bad faith. These are two entirely different questions, analytically and practically. *Delta Air Lines* teaches that Rule 68 involves no concept of "reasonableness" or "good faith"—if a defendant's settlement offer was more than the plaintiff's verdict, the plaintiff must bear the costs, while if his offer turns out to be less, the defendant must bear the costs.

Thus petitioners' (and the Government's) repeated references to the need to encourage "good faith" consideration of "reasonable" settlement offers are really arguments that bad faith rejection of a reasonable settlement offer should be a factor which the District Courts may consider *under Section 1988* in deciding on the amount of a reasonable fee. However, that question is not presented on the present record in this Court. As noted above, the District Court never considered the matter under Section 1988, having ruled that Rule 68 precluded any consideration of an award of post-offer fees.

The wording of Section 1988 was not intended to change the operation of Rule 68. The legislative history of Section 1988 makes it clear where the phrase "as part of the costs" comes from: Congress simply "tracked" the language of earlier civil rights fee award statutes. It adopted the language to promote uniformity among the civil rights statutes and, as this Court explained in *Hutto v. Finney*, 437 U.S. 678 (1978), to assure that attorneys' fees could be recovered against a state notwithstanding the Eleventh Amendment. There is no indication in the history of Section 1988 that it was intended to define "costs" for purposes of Rules 54(d) and 68.

B. The existence of numerous other fee award statutes, some worded like Section 1988, some worded differently, confirms that "costs" in Rules 54(d) and 68 cannot be construed by reference to such statutes. In enacting fee-award statutes, Congress' practice has been sometimes to describe attorneys' fees as "costs" in fee award statutes, sometimes not to do so, sometimes to use different such formulations even in a single statute, and sometimes to use language which omits the

word "costs" altogether—all according to no consistent pattern. Thus attorneys' fees are said to be "part of the costs" under Section 1988, but not, for example, under the Fair Housing Act, Title VIII, Civil Rights Act of 1968, 42 U.S.C. § 3612(c). Petitioners have suggested no reason why fees should be at risk under Section 1988 but not under the latter statute (and dozens of others which are similarly worded).

Adoption of petitioners' proposed construction of Rule 68 would lead to untenable distinctions between and among cases arising under the numerous fee award statutes. It would contravene basic principles of statutory construction to read Rule 68 as producing such "untenable distinctions." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

Petitioners (and the Government) miss the point by their emphasis upon those statutes which (like Section 1988) are worded to authorize a fee award "as part of the costs." To sustain their proposed construction of Rule 68, they would have to show that Congress had some reason to *distinguish* between, for example, the Fair Housing Act, 42 U.S.C. § 3612(c) and Section 1988, and to punish non-settling plaintiffs in Section 1988 cases far more severely than non-settling plaintiffs in cases under the Fair Housing Act or the numerous other statutes which are worded to allow an award of fees *in addition to* costs. They have made no such showing. It defies common sense that Congress had any such intention.

C. The recent Advisory Committee proposals to amend Rule 68 underscore how inappropriate it would be to single out cases under Section 1988 (and similarly-worded fee award statutes) for the application of present Rule 68 in the manner contended for by petitioners (and the Government). The Advisory Committee proposals seek to increase materially the incentives for settlement by using fee-shifting as a punishment for rejection of a settlement offer. But the Advisory Committee would do so only after supplying safeguards absent from the present Rule and, under *Delta Air Lines*, not to be implied into it.

Thus, even advocates of these proposals recognize that the present Rule cannot fairly be used to change the incidence of attorneys' fees. This should be no less true in cases where a reasonable fee award would otherwise be appropriate than in cases not arising under a fee award statute.

D. Finally, a construction of the Federal Rules which precluded an award of fees under Section 1988 and similarly worded statutes would raise the most serious questions under the Rules Enabling Act, 28 U.S.C. § 2072. The Court of Appeals below was correct in construing Rule 68 to avoid such questions.

II. The Court of Appeals also correctly held that the District Courts' discretion under Section 1988 was not intended to be ousted by Rule 68. The legislative history of Section 1988 makes clear that the District Courts were entrusted with broad discretion to award reasonable fees, and contains no indication that the mandatory "costs"-shifting provisions of Rule 68 were intended to deprive them of that discretion.

This point goes only to the proper construction of Rule 68. It may be that under Section 1988 or other particular fee award statutes, a court can properly consider bad faith rejection of a reasonable settlement offer in deciding what is a "reasonable fee." But that result cannot be reached by applying the mechanical cut-off of "costs" effected by Rule 68, and that issue cannot be resolved on the record in this case, where no determination under Section 1988 was ever made by the District Court.

Argument

Point I

THE WORD "COSTS" IN RULE 68 IS INTENDED TO BE CONSTRUED UNIFORMLY TO ENCOMPASS ONLY THOSE ITEMS TAXABLE AS COSTS IN ALL CIVIL ACTIONS

A. The language and purpose of Rule 68 establish that the term "costs" was intended to encompass only those items traditionally taxable as costs by the clerk of the court under Rule 54(d).

Rule 68 provides that if a defending party makes an offer of judgment that is refused, and the plaintiff thereafter obtains a judgment "not more favorable than the offer," the plaintiff must pay post-offer costs.⁷ The Rule is automatic and me-

⁷ Rule 68: Offer of Judgment.

At any time more than 10 days before the trial begins, the party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount or extent of liability.

The Rule has been amended only twice in its 46-year history, and remains largely unchanged from its original form. See 7 J. Moore, *Moore's Federal Practice*, ¶ 68.01 (2d ed. 1983 & Supp. 1984).

chanical in its operation; it looks solely to the respective amounts of the offer and the verdict. If the offer exceeds the verdict, the plaintiff "must pay the costs incurred after the making of the offer." Although the Advisory Committee's brief note to the Rule contains no express statement of its purpose, Rule 68 has been understood to encourage plaintiffs to accept settlement by supplying a modest deterrent to rejections of a defendant's offer. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

In *Delta Air Lines*, this Court's first consideration of Rule 68 since its adoption in 1938, this Court made several rulings which are of importance to the present case. First, this Court held that Rule 68 must be construed *in pari materia* with Rule 54(d), Fed. R. Civ. P., and indeed that failure so to construe it would be "to attribute a schizophrenic intent to the drafters." *Id.* at 353-56. This Court stated that Rule 68 was intended to "alter the Rule 54(d) presumption" that a prevailing party recovers the "costs" referred to in Rule 54(d). *Id.* at 351. It was in part based on this holding that this Court concluded that the Rule denies "costs" only where the plaintiff recovers a judgment and has no application where the plaintiff recovers nothing. *Id.* at 354-55.

Second, this Court held that Rule 68 did not contain "a reasonableness requirement." The lower court decision reversed by this Court had held that "only reasonable offers trigger the operation of Rule 68." This Court rejected that interpretation, and declined to "read a reasonableness requirement into the Rule." *Id.* at 355.

In sum, this Court stated that the purpose of Rule 68 is the relatively narrow one of "provid[ing] an additional inducement to settle in those cases in which there is a strong probability that plaintiff will obtain a judgment but the amount of recovery is uncertain." *Id.* at 352.⁸ The particular "additional

⁸ This Court's reference to "an additional inducement" reflected its recognition of the fact that, "In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial." *Delta Air Lines*, 450 U.S. at 352.

inducement" which Rule 68 supplies is the relatively narrow one of depriving the plaintiff of Rule 54(d) costs.

It is clear from the language and structure of Rules 54(d) and 68 that the "costs" to which they refer do not include attorneys' fees in cases arising under the fee award statutes.⁹ Rule 54(d) provides that costs may be taxed by the clerk of the court on one day's notice. This provision clearly refers to "costs" of the sort specified in 28 U.S.C. § 1920—routine, readily determinable charges which it would be appropriate to leave to a clerk, and as to which a single day's notice of settlement is appropriate.¹⁰ The conclusion that "costs" refers only to charges taxable by a clerk is confirmed by the fact that when particular Federal Rules are meant to provide for attorneys' fees as expenses, the inclusion is explicit and the authority to award fees is expressly granted to the Court, not the clerk. See Rules 11, 16(f), 26(g), 30(g), 37, Fed. R. Civ. P.¹¹ The Court of Appeals correctly adopted a construction of "costs" which respects this clear, consistent usage in the Federal Rules. It correctly rejected a proposed construction which, because of the interrelation of Rules 68 and 54(d) explained in this Court's *Delta Air Lines* decision, would lead to the result that the

⁹ This Court has expressly reserved the question whether "costs" in Rule 54(d) incorporates Section 1988. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 454-55 n.17 (1982). That question must be decided here. It should be decided against such incorporation.

¹⁰ In applying Rule 54(d), the lower Federal Courts have consistently used the particular fees and other items listed in § 1920 as the definition of the term. See, e.g., *White v. New Hampshire Dep't of Employment Security*, 629 F.2d 697, 701-03 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982); *Dodwell v. City of Apopka*, 698 F.2d 1181, 1188-89 & n.12 (11th Cir. 1983). This reliance on § 1920 is consistent with the "uniform structure established by the 1853 Act" which adopted § 1920. *Roadway Express*, 447 U.S. at 761.

¹¹ These rules all involve sanctions for deliberate misconduct, and are penal in nature. By contrast, Rule 68, although designed to encourage settlement and avoid the needless expense of a trial, does not apply only where misconduct or bad faith has been shown.

Clerk of the Court could rule on fee applications on one day's notice.

As the Court of Appeals correctly stated, this Court's recent decision in *Roadway Express Inc. v. Piper*, 447 U.S. 759 (1980), strongly supports the decision below. In *Roadway Express* this Court was faced with determining Congress' intent in enacting 28 U.S.C. § 1927 which also uses the term "costs" without further definition. There, too, petitioner contended that "costs" should be read to include attorneys' fees where a fee award statute provides that fees should be awarded "as part of the costs," but not be so read where a fee statute did not apply.

Rejecting that position, this Court held that the word "costs" should be construed uniformly:

. . . Roadway's statutory construction would create a two-tier system of attorney sanctions. A number of federal statutes permit the award of attorneys' fees. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 260, n. 33. Under Roadway's view of § 1927, lawyers in cases brought under those statutes would face stiffer penalties for prolonging litigation than would other attorneys. *There is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. A court's processes may be as abused in a commercial case as in a civil rights action.* Without an express indication of congressional intent, we must hesitate to reach the imaginative outcome urged by Roadway, particularly when a more plausible construction flows from the original enactments in 1813 and 1853.

—447 U.S. at 762-63
(emphasis added).

This ruling is directly germane here. Federal Rules 54(d) and 68, like § 1927, are meant to be applied uniformly to all civil actions. Like all the Federal Rules, they are expressly intended to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1 (emphasis added). A construction of Rules 54(d) and 68 that would include attorneys' fees as

"costs" where Section 1988 or a similarly-worded fee award statute was involved, but not include them where no such statute was involved, would abrogate the uniform application of Rule 68 to all civil actions. Indeed, the relatively modest impact which Rule 68 has "in a commercial case"—to use the example mentioned by this Court in the passage quoted above—would stand in starkest contrast to the life-or-death effect it could have "in a civil rights case" or certain other fee-award cases. The "imaginative outcome" rejected in *Roadway Express* must likewise be rejected here.

Like the argument rejected in *Roadway Express*, petitioners' (and the Government's) construction of Rule 68 would create a "two-tier system" of cost-shifting. Indeed, closer analysis of the fee award statutes reveals that a *three*-tier system would result: for while cases arising under *some* fee-award statutes would be affected—those which use the phrase "as part of the costs"—cases arising under dozens of other fee award statutes—those which use a different form of words, such as the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(5)—would not be so affected. See Point I.B., *infra*. Introducing these kinds of "untenable distinctions" into the construction of the Federal Rules of Civil Procedure would violate first principles of statutory construction. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

Roadway Express is directly relevant for another reason as well. In that decision, this Court specifically addressed the question whether Section 1988 made any change in the meaning of the word "costs" in § 1927 or in the Congressional policy of uniformity in defining "costs." This Court held that it did not:

[Petitioner] insists, however, that its recovery should not be restricted to the costs listed in § 1920. It argues that since courts look to § 1920 to determine the costs taxable under § 1927, they should be equally free to define costs according to other statutes that may be involved in a lawsuit. [Petitioner] emphasizes that the civil rights statutes allow the award of attorneys' fees "as part

of the costs" of the litigation This superficially appealing argument cannot survive careful consideration.

* * *

[Petitioner] offers no evidence that Congress intended to incorporate those attorneys' fee provisions into § 1927. [Section 1988] makes [no] mention of attorney liability for costs and fees. [Petitioner] identifies nothing in the legislative records of those provisions that suggests that Congress meant to control the conduct of litigation.

—447 U.S. at 758, 761
(footnote and citations
omitted)(emphasis
added).

The "superficially appealing argument" from the language of Section 1988 that was rejected in *Roadway Express* likewise "cannot survive careful consideration" in this case. Here, too, petitioners "identify nothing" in the legislative history of Section 1988 indicating that Congress even considered Rule 68 when it included attorneys' fees "as part of the costs" in enacting Section 1988. There is no reference to Rule 68 in the Senate Report on Section 1988, S. Rep. No. 1011, 94th Cong. 2d Sess. (1976), reprinted in 1976 U.S. Code Congressional and Administrative News 5908, or the House Report, H.R. Rep. No. 1588, 94th Cong. 2d Sess. (1976). The House Report does not even mention the phrase "attorneys' fee as part of the costs" in its description of the "key features" of Section 1988. H.R. Rep. No. 1588, 94th Cong. 2d Sess. 6 (1976).

The legislative history of Section 1988 indicates that the use of the phrase "attorneys' fee as part of the costs" had nothing to do with Rule 68. Rather, Section 1988 was designed to foster uniformity in the fee award process and to overcome *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), which had precluded an award of attorneys' fees without express Congressional authorization. The specific language which Congress chose therefore "tracked" the explicit fee award provisions already included in Titles II and VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(b) (Title II), 42

U.S.C. § 2000e-5(k) (Title VII), and § 402 of the 1975 Voting Rights Act amendments, 42 U.S.C. § 1973(e), whose validity this Court had consistently upheld. The House Report states:

Existing statutes allowing fees in certain civil rights cases [provide for] discretionary awards for any prevailing party. Keeping with that pattern, *section 1988 tracks the language* of the counsel fee provisions of [the statutes cited in text above].

H.R. Rep. No. 1588, 94th Cong. 2d Sess. 5 (1976) (emphasis added). The legislative history of those earlier statutes likewise contains no reference to Rule 68. S. Rep. No. 872, 88th Cong. 2d Sess. (1964), H.R. Rep. No. 914, 88th Cong. 2d Sess. (1964), reprinted in 1964 U.S. Code Congressional and Administrative News 2355; S. Rep. No. 295, 94th Cong. 1st Sess. (1975), H.R. Rep. No. 196, 94th Cong. 1st Sess. (1975), reprinted in 1975 U.S. Code Congressional and Administrative News 774.

In *Hutto v. Finney*, 437 U.S. 678 (1978), this Court held that Congress described attorneys' fees as "costs" under Section 1988 not for any reason associated with Rule 68, but rather to permit an award of such fees against a state notwithstanding the Eleventh Amendment. This Court stated:

Just as a federal court may treat a state like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the states, as it does to all other litigants, without expressly stating that it intends to abrogate the states' Eleventh Amendment immunity.

—437 U.S. at 696.

Moreover, this Court in *Hutto* attached significance to the phrase "as part of the costs" only after finding clear, affirmative indications in the legislative history of Section 1988 supporting that interpretation. See 437 U.S. at 693-95. However, as set forth above, there is *no* indication in the legislative history that Congress' use of the phrase "as part of the costs" was intended to bring the mandatory "costs"-shifting provisions of Rule 68 into play.

Neither petitioners nor the Government comes to grips with the holding of *Delta Air Lines*, with the inter-relationship between Rules 54(d) and 68, with the *Roadway Express* decision, or with the fact that there is no legislative history to support their argument that Section 1988 was meant to define "costs" in Rule 68. Instead, they argue repeatedly the "policy" contention that their construction would foster "good faith" consideration of "reasonable" settlement offers. *E.g.*, Petitioner's Brief at 24-26; Brief of the United States at 18-19. But these contentions simply ignore that this Court held in *Delta Air Lines* that Rule 68 contains no "reasonableness requirement" and that one should not be read into it. See *Delta Air Lines*, 450 U.S. at 355-56. Such judicial legislation would be equally inappropriate here.

Equally misplaced is the Government's reliance on cases in the lower courts that have apparently held that Section 1988 permits consideration of whether a plaintiff has in bad faith rejected a reasonable settlement offer. *E.g.*, Brief of the United States at 22. The issue of whether Section 1988 permits such consideration in determining a "reasonable" fee is not presented in this case: neither the District Court nor the Court of Appeals ever addressed that question, and no determination has been made that respondent acted in bad faith in rejecting petitioners' offer.¹² The only issue in this case is whether Rule 68 precludes any consideration of a fee award for services rendered after rejection of an offer, even if that rejection was perfectly justified by the facts at the time. Rule 68 has no such preclusive effect.

¹² The Court of Appeals had remanded the case for determination of a reasonable fee for services rendered after the Rule 68 offer was made, and the circumstances of the settlement offer, and of its rejection, might have been litigated in making that determination. But the petition filed in this Court prevented that determination. There is thus no way to tell from the present record what factors existed at the time the Rule 68 offer was rejected, nor what conditions might have changed from that date to the date of the verdict.

B. The various statutes allowing awards of attorneys' fees were not intended to define "costs" in Rule 68.

Congress did not intend that the various statutes authorizing the award of attorneys' fees would govern the definition of "costs" in Rules 54(d) and 68. As is clear from review of the fee award statutes, which now number over 100, if these statutes (including Section 1988) were used to define "costs" in Rule 68, Congress would have created an inconsistent, irrational scheme based upon "untenable distinctions." Rule 68 must be interpreted to avoid such a result. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

Congress has enacted numerous statutes expressly authorizing the award of attorneys' fees.¹³ What is especially important here is that some of these statutes define "costs" to include attorneys' fees,¹⁴ while others authorize attorneys' fees in addition to "costs."¹⁵ Even within distinct legislative areas, such as consumer safety and environmental protection, Congress has been inconsistent as to whether attorneys' fees are or are not a part of "costs."¹⁶ Further, some fee award statutes do

¹³ There are presently over 100 such fee award statutes. A compilation is found in 3 Derfner & Wolf, *Court Awarded Attorney Fees*, chs. 29-45 (1983). The number of these statutes proliferated after this Court's decision in *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975), which held that the federal courts could not award attorneys' fees absent express statutory authorization.

¹⁴ See, e.g., The Clean Air Act, 42 U.S.C. § 7622(e)(2); Commodity Futures Trading Commission Act of 1974, 7 U.S.C. § 18(f); Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(a); and the Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1975.

¹⁵ See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)(2); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1400(b); National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. § 5412(b); Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C).

¹⁶ Compare the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) ("a reasonable attorneys' fee to be paid by the defendant, and costs of the

not use the word "costs" at all;¹⁷ and in at least one instance, a single statute uses both a "costs" and a non-"costs" formulation.¹⁸ Consequently, a senseless scheme would result from attempting to define "costs" in Rule 68 by reference to the various fee award statutes. A few examples make the point.

Two consumer safety statutes, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1901-2012 (the "Motor Vehicle Act"), and the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083, are similar in purpose and structure. Both authorize the promulgation of safety standards—bumper standards under the Motor Vehicle Act, and consumer product safety standards under the Consumer Product Safety Act. Both were enacted in the same Congressional session. Both expressly authorize private causes of action for violations of the statute. And both contain provisions granting attorneys' fees to prevailing plaintiffs. The Motor Vehicle Act, however, authorizes the recovery of "costs and reasonable attorneys' fees . . ." (15 U.S.C. § 1918(a)) while the Consumer Product Safety Act authorizes the recovery of "the costs of suit, including reasonable attorneys' fees." 15 U.S.C. §§ 2072(a), 2073.

If the fee award statutes were deemed to define "costs" for Rule 68 purposes, a successful plaintiff would, where the requirements of Rule 68 were otherwise met, be barred from recovering attorneys' fees for a defective toaster (under the Consumer Product Safety Act), but not for a defective bumper (under the Motor Vehicle Act). Nothing in the legislative

action") with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees)"). Compare also the Toxic Substances Control Act, 15 U.S.C. § 2619(c)(2) ("costs of suit and reasonable fees for attorneys and expert witnesses") with Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) ("costs of litigation, including reasonable attorney and expert witness fees").

17 E.g., Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(2).

18 Compare Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(2), with *id.*, § 1349(a)(5).

history of either Act indicates a Congressional intent to produce this anomalous result. S. Rep. No. 835, 92d Cong. 2d Sess. (1972), H.R. Rep. No. 1158, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Congressional and Administrative News 4573, 4596; S. Rep. No. 985, 92d Cong. 2d Sess. (1972), H.R. Rep. No. 1198, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Congressional and Administrative News 4472.¹⁹

Moreover, if Rule 68 significance were attached to the phrase "as part of the costs" in Section 1988, the anomalous situations just described would also exist among the civil rights statutes. Thus, while Section 1988 follows some civil rights statutes in including attorneys' fees "as part of the costs," the Fair Housing Act, Title VIII, Civil Rights Act of 1968, 42 U.S.C. § 3612(c), allows the court to award court costs *and* reasonable attorneys' fees to a prevailing plaintiff under certain circumstances. If the variously worded fee award statutes governed the definition of "costs" under Rule 68, a plaintiff who brought a fair housing claim under the Fair Housing Act would not risk his attorneys' fees by the operation of Rule 68,

19 Likewise, inexplicably inconsistent results would result under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a-1692o. Both Acts protect the consumer from deceptive practices, the former by prescribing standards governing the content and appearance of warranties, the latter by prohibiting abusive, deceptive and unfair debt collection practices. Both also create an express cause of action for injured consumers and grant the courts discretion to award attorneys' fees to a prevailing plaintiff. The Acts differ, however, in their phrasing of this right. The Magnuson-Moss Act allows "costs and expenses (including attorneys' fees)," 15 U.S.C. § 2310(d)(2), while the Fair Debt Collection Act grants a prevailing plaintiff the "costs of the action, together with a reasonable attorneys' fee." 15 U.S.C. § 1682(k)(a)(3). There is nothing in the legislative history to justify the conclusion that Congress intended to preclude a Magnuson-Moss Act plaintiff from an award of fees in the face of a valid Rule 68 offer, but to allow such an award to a Fair Debt Collection Act plaintiff. S. Rep. No. 151, 93d Cong. 1st Sess. (1974), H.R. Rep. No. 1107, 93d Cong. Sess. (1974), *reprinted in* 1974 U.S. Code Congressional and Administrative News 7702; S. Rep. No. 382, 95th Cong. 1st Sess. (1977), H.R. Rep. No. 131, 95th Cong. 1st Sess. (1977), *reprinted in* 1977 U.S. Code Congressional and Administrative News 1695.

while, if he brought the same claim under 42 U.S.C. § 1982, he would run that risk.²⁰

The Government points to the existence of fee award statutes in 1938 when Rule 68 was adopted to show that Congress intended the word "costs" in the Rule to be construed according to those statutes. Brief of the United States at 12-13, and Appendix. But the same senseless scheme that would result under different fee award statutes adopted since 1938 would exist under the statutes cited by the Government. For example, the Railway Labor Act of 1926, 45 U.S.C. § 153, and the Fair Labor Standards Act of 1938, 29 U.S.C. § 216,²¹ are both designed to protect employees. The Fair Labor Standards Act establishes maximum hour and minimum wage guidelines, whereas the Railway Labor Act creates the National Railway Adjustment Board to mediate disputes between carriers and railroad employees concerning rates of pay, rules, or working conditions. Both Acts expressly authorize private causes of action for violations of the statute. Both Acts also contain provisions granting attorneys' fees to prevailing plaintiffs. But the Fair Labor Standards Act awards prevailing plaintiffs "a reasonable attorney's fee . . . and costs of the action,"

20 42 U.S.C. § 1982 provides: "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court noted that while the coverage of Section 1982 differs from that of Title VIII, both Acts prohibit all racial discrimination, private as well as public, in the sale of rental property. As a consequence, litigants can bring housing discrimination suits under both statutes. Giving substance to the otherwise inexplicable differences in phrasing could, in an action which raised claims under both statutes, lead to the result that a plaintiff could be denied post-offer fees if he prevailed under the Section 1982 claim—because fee awards would then be governed by Section 1988—but be awarded fees if he prevailed under the Title VIII claim.

21 The Government indicates that this statute was enacted prior to Rule 68. In fact the statute was enacted on June 25, 1938, whereas Rule 68 became effective in January, 1938. In any event, it is plain that at the time Congress was considering Rule 68, it had before it statutes that were inconsistent concerning whether awards of attorneys' fees were a part of costs.

whereas the Railway Labor Act awards a prevailing plaintiff "a reasonable attorney's fee to be taxed and collected as part of the costs of the suit."

To argue that Rule 68 should be construed by reference to existing fee award statutes is to suggest that Congress intended that a successful Railway Labor Act plaintiff would be barred from recovering his post-offer fees where the requirements of Rule 68 were otherwise met, while a successful Fair Labor Standards Act plaintiff could recover all of his fees. Such a distinction is untenable.

In sum, careful analysis of the fee award statutes shows that, in approving Rule 68, Congress did not intend that the Rule would be construed differently depending on the different language of the different fee award statutes.²² Certainly it makes more sense to think that Congress intended Rule 68 to be construed by reference to 28 U.S.C. § 1920, thereby producing a consistent and uniform statutory scheme.

C. The recent Advisory Committee proposal to amend Rule 68 confirms that present Rule 68 does not restrict statutory fee awards.

That present Rule 68 does *not* affect the incidence of attorneys' fees is also evident from the recent proposals to amend the Rule advanced by the Committee on Rules of Practice and Procedure. See 98 F.R.D. 339, 361-67 (1983). As the Court of Appeals below correctly noted, the very making of those proposals suggests that the Advisory Committee was

22 It is no answer to say, as the Government repeatedly does, that the fee award statutes using the phrase "as part of the costs" are "important," the implication being that the other statutes that do not use the phrase are less "important." *E.g.*, Brief of the United States at 11. The Government suggests no criterion by which the determination of "importance" should or could be made by the District Courts. It bears emphasis that among the statutes that do *not* use the "as part of the costs" formulation are the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b), and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1400(b). It would certainly come as a surprise to Congress that the Government is suggesting to this Court that those statutes are in some sense not "important."

at least uncertain that present Rule 68 could properly be construed to produce the result sought by petitioners (and the Government).²³

Indeed, it is evident from the Advisory Committee's proposals that it did not consider the present Rule well-adapted to fee-shifting. Thus, as noted above, the Advisory Committee was concerned about what it called the "Draconian impact of an 'all-or-nothing' [fee-shifting] rule," *id.* at 365, and therefore would eliminate the mandatory character of the Rule in its present form and give the District Courts discretion not to shift fees. *Id.* at 365-66. The Advisory Committee would also make the Rule apply even-handedly to plaintiffs and defendants alike. *Id.* at 364.

Including attorneys' fees as part of "costs" under the present rule would have the "Draconian impact of an 'all-or-nothing' rule" in cases under those fee award statutes worded like Section 1988. Because present Rule 68 is mandatory—"the plaintiff *must* bear the costs"—a District Court would have no discretion to award the plaintiff any post-offer fees even if the circumstances clearly indicated that plaintiff was not reckless, or even blameworthy, in rejecting the offer.

Moreover, the Advisory Committee proposals would change the present Rule to make it a "two-way street"—defendants who reject settlement offers would be liable to the fee-award

²³ After full consideration by the Committee on the Federal Courts, the Association has recommended against the Advisory Committee's proposals, because, among other reasons, the Association believes that the shifting of attorneys' fees to penalize non-settling litigants seems too severe a sanction for failing accurately to predict the outcome of a trial. Moreover, the Association concluded that the proposals would tend unduly to discourage novel theories of law and have an unfair impact on less affluent litigants. The Association also believes that the proposals would foster collateral litigation over the reasonableness of a settlement rejection, which would be undesirable in itself and would almost certainly force the District Courts to inquire into confidential attorney-client discussions.

In light of the Government's decision to participate on the side of petitioners in this case, it should be noted that the Government also opposed the Advisory Committee proposals, for many of the same reasons. See Letter of the Acting Deputy Attorney General to the Chairman of the Committee on Rules of Practice and Procedure (February 28, 1984).

sanction as much as non-settling plaintiffs. But the present Rule is a "one-way street"—only plaintiffs are at risk. It is inconsistent and unfair, as the Advisory Committee implicitly recognized, to raise the "stakes" by including fees in the "costs" covered by Rule 68 but subject only one party, the plaintiff, to the risk of this sanction. This is, of course, particularly true where only a "sub-class" of plaintiffs—those otherwise entitled to fee awards under particular fee award statutes which are worded to make attorneys' fees "part of the costs"—would be affected.

D. The Rules Enabling Act precludes a construction of Rule 68 that would bar an otherwise appropriate award of attorneys' fees under Section 1988 and similarly worded statutes.

Finally, as the Court of Appeals below properly noted, an interpretation of "costs" in Rule 68 to deny fees which a prevailing civil rights plaintiff would otherwise receive might put Rule 68 beyond the rule-making power granted by the Rules Enabling Act, 28 U.S.C. § 2072. That statute provides in part that the Rules "shall not abridge, enlarge or modify any substantive right."

Rule 68 is procedural in that its aim is to contribute to more efficient litigation; conventionally applied to deny Rule 54(d) "costs" to a prevailing plaintiff, it is sanctioned by the Rules Enabling Act.²⁴ However, to apply it to preclude a fee award expressly authorized by Congress in legislation adopted under Section 5 of the Fourteenth Amendment would, at the very least, raise a serious question whether it abridged or modified a substantive right. It would be hard to think of a policy area of greater national importance than the civil rights area, and it is well-settled that Congress' powers under Section 5 are the broadest legislative powers it possesses. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976). Accordingly, if the "substantive

²⁴ See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), which has for many years been the leading case on the validity of federal rules under this provision of the Act.

rights" limitation in the Rules Enabling Act has any meaning at all, it must at the least raise a serious question under the Enabling Act if a Rule would be in direct conflict with a Section 5 statute—*i.e.*, foreclosing a Section 1988 fee award that might otherwise be appropriate.²⁵

Any construction raising a question of compliance with the Rules Enabling Act should be avoided. Given the absence of a clear indication—or *any* indication—that Congress understood that its Section 5-based statute, and the fee awards which it authorized, would be cut off by Rule 68, the Court of Appeals was correct in holding that Rule 68 should not be construed as petitioners contend.

Point II

THE FUNDAMENTAL CIVIL RIGHTS POLICIES SERVED BY SECTION 1988 WERE NOT INTENDED TO BE OVERRIDDEN BY THE MANDATORY "COSTS"- SHIFTING PROVISION OF RULE 68

The Court of Appeals was also correct that the legislative history of Section 1988, and the policies underlying it, indicate that the phrase "as part of the costs" in Section 1988 was not intended to bring into play the mandatory "costs"-shifting provision of Rule 68. The broad discretion which Section 1988 expressly confers on the District Courts to award a reasonable attorneys' fee "[i]n *any* action or proceeding" was not intended to be ousted by the defendant's conduct in making a settlement offer which proves, in hindsight, to have been more advantageous than the ultimate judgment. The Court of Appeals correctly held that Congress did not intend the fundamental

²⁵ See Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724-25 (1974): "The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a *right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.*" (Citations omitted; emphasis added.) This, of course, is precisely what Section 1988 is about.

national civil rights policies which Section 1988 fee awards advance to be subjected to the automatic "costs"-shifting effect of Rule 68.

Congress' clear purpose in Section 1988 was to *foster* private civil rights litigation in order to complement Government enforcement. By contrast, Rule 68's purpose is "to encourage settlement of litigation." *Delta Air Lines, Inc.*, 450 U.S. at 352. Thus, Section 1988 and Rule 68 are aimed at different objectives: the former aims at facilitating suit by private plaintiffs in an area of fundamental national policy while the latter raises the stakes for any plaintiff who presses his case, regardless of its nature. Congress deemed Section 1988 "essential" to the enforcement of constitutional rights. S. Rep. No. 1011, 94th Cong. 1st Sess. 2 (1976), *reprinted in* 1976 U.S. Code Congressional and Administrative News 5910. As fully set forth at pp. 13-15 above, the legislative history contains no reference whatever to Rule 68.

This Court has repeatedly recognized that Section 1988 is intended to "ensure effective access to the judicial process." *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (1983). To the same effect, in *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980), this Court stated that "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance" with the civil rights laws (citing S. Rep. No. 1011, 94th Cong. 2d Sess. 5 (1976)).

Application of Rule 68 as contended for by petitioners would penalize plaintiffs who prevail in protecting their civil rights, simply because the defendant has forced them to a guess as to the amount of his liability and they prove to have guessed incorrectly. Such a penalty is entirely inappropriate in civil rights cases and would frustrate the purpose of Section 1988. As this Court has recognized:

No matter how honest one's belief that he has been a victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the

midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). Because of the mechanical, mandatory operation of Rule 68, the reading of Rule 68 contended for by petitioners (and the Government) would place in the hands of civil rights defendants, subject to no judicial review, the power to subvert important litigation by making offers which indigent plaintiffs (or their attorneys) might well hesitate to reject.

Recognizing Congress' important goal in fee-award statutes, this Court has declared repeatedly that a prevailing civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (awards under Title II of the 1964 Civil Rights Act); *Northcross v. Memphis Board of Education*, 412 U.S. 427 (1974) (the Emergency School Aid Act of 1972); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (Title VII of the 1964 Civil Rights Act); *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (1983) (Section 1988). Such "special circumstances," which are unusual in successful civil rights suits, can only be determined by the District Courts in reviewing a fee application: but Rule 68, if construed as petitioners (and the Government) read it, would preclude any such judicial determination, just as has happened in this case.

Further, to an unusual degree, the rights of third parties hang in the balance in civil rights cases. As this Court and Congress have agreed, when a civil rights plaintiff prevails, "he does so not only for himself but also as a 'private attorney general' vindicating a policy that Congress considered of highest importance." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402, cited in S. Rep. No. 1011, 94th Cong. 1st Sess. 3 (1976). The application of Rule 68 in the manner contended for by petitioners (and the Government) would separate the named plaintiff's interests from those of other unnamed parties who could benefit from a full prosecution of the case. (It is

noteworthy in this connection that the Advisory Committee's proposals to amend Rule 68, see Point I.C., *supra*, would *not* apply Rule 68 to class or derivative actions, where the rights of absent parties are also in the balance. See 98 F.R.D. 339, 367.)

Moreover, if Rule 68 barred the award of post-offer fees in civil rights cases, it would tend to create a conflict between the interests of the plaintiff's attorney and those of his client. This would be particularly inappropriate in the civil rights context, where as this Court recently affirmed, the need to "attract competent counsel" was one of Congress' concerns in drafting Section 1988. *Blum v. Stenson*, 52 U.S.L.W. 4377 (1984) (citing S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976)). The Court of Appeals' decision in this case properly avoids subjecting counsel to the ethical problems that would tend to result.²⁶

Finally, the mandatory nature of Rule 68 is fundamentally incompatible with the discretionary nature of Section 1988. As this Court has noted, "the range of discretion of the courts in making [attorneys' fees] awards are matters for Congress to determine [footnote omitted]." *Alyeska Pipeline Co. v. The Wilderness Society*, 421 U.S. 240, 262 (1975). Under Section 1988, that discretion is very broad, as this Court recently stressed in discussing the factors which the District Courts should consider in determining the amount of fee awards. *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (1983). In the Congressional scheme of broad discretion over fee awards, the automatic, non-discretionary operation of Rule 68 has no place.

²⁶ The Court of Appeals did not consider these ethical problems particularly serious. *Chesny v. Marek*, 720 F.2d 474, 477-78. However, it is surely anomalous to adopt a reading of Rule 68 which would create *any* ethical problem for lawyers who bring a class of cases which Congress specifically intended to foster and encourage. Moreover, in its Ethics Opinion No. 80-94, this Association concluded that it would be unethical to require a plaintiff's attorney to forgo as part of a settlement a statutorily-authorized fee award. The Association's Ethics Committee reasoned that this would place the attorney in an untenable position, having to bargain over his own fee while bargaining over a settlement for his client. Any interpretation of Rule 68 that allows fees to be precluded would create the same problems.

Conclusion

The judgment and mandate of the Court of Appeals should be affirmed.

Dated: New York, New York
September 11, 1984

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI
AND LAWRENCE RHODE,

Petitioners,

v.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE ALLIANCE FOR JUSTICE AS
AMICUS CURIAE ON BEHALF OF ITS MEMBERS*
SUPPORTING RESPONDENT

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filing of this amicus brief, are listed on the inside cover.

The members of the Alliance for Justice, who join in the filing of this amicus brief, include:

Business and Professional People
for the Public Interest

Center for Law and Social Policy

Center for Law in the Public Interest

Center for National Policy Review

Center for Science in the Public
Interest

Consumers Union

Education Law Center

Employment Law Center

Environmental Defense Fund

Equal Rights Advocates

Food Research and Action Center

Harmon & Weiss

Institute for Public Representation

Juvenile Law Center

Mental Health Law Project

NOW Legal Defense and Education Fund

National Wildlife Federation

National Women's Law Center

Native American Rights Fund

New York Lawyers for the Public
Interest

Public Advocates, Inc.

Sierra Club Legal Defense Fund

Women's Law Project

Women's Legal Defense Fund

QUESTION PRESENTED

Whether Rule 68 of the Federal Rules of Civil Procedure should be interpreted by the Court as requiring a district judge to deny a prevailing plaintiff in a civil rights case recovery for attorney's fees under 42 U.S.C. Section 1988 (and other similarly worded federal fee-shifting statutes) for all services rendered after the rejection of a Rule 68 offer of judgment if the plaintiff fails to obtain a judgment as favorable as the offer.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI
AND LAWRENCE RHODE,

Petitioners,

v.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE ALLIANCE FOR JUSTICE
AS AMICUS CURIAE ON BEHALF OF ITS
MEMBERS SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE

The Alliance for Justice is a
national association of public interest
legal organizations. Its members, who

join in the filing of this amicus brief,^{1/} are typical of the public interest law firms that litigate under the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988), and under other fee-shifting statutes that may be affected by the Court's decision in this case.^{2/}

1/ Members of the Alliance for Justice are listed on the inside of the front cover of this brief.

2/ Members of the Alliance also litigate under a number of other statutes with fee-shifting provisions that may be affected by the Court's ruling in this case. These statutes include, inter alia: the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k); the Clean Air Act, 42 U.S.C. § 7607(f); the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) §§ 7413(b), 7604(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1365(d); the Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4); the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) and (F); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. V) § 6972(e); and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d).

One of the Alliance's foremost purposes is to ensure access to the judicial process for those who have historically lacked the resources to obtain lawyers to assert their rights, including Black and Native Americans, poor persons, consumers, women, children, and persons institutionalized in mental health facilities. Hence, the persons served by Alliance for Justice members are representative of the persons whom Congress sought to afford access to the courts through laws such as Section 1988.

A number of these persons, with the assistance of public interest lawyers, are litigating as "private attorneys general" to advance congressional policies and to protect constitutional rights in cases covered by Section 1988

and other fee-shifting laws.^{3/} These civil rights cases include, for example, challenges to discrimination in public housing^{4/} and segregation in public schools.^{5/} Alliance members have also

3/ The Senate Report accompanying Section 1988 even cites a Title VII case litigated by an Alliance member (the Center for Law in the Public Interest) as an example of a case where the standard for fee awards was properly applied in order "to attract competent counsel" to civil rights cases. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code & Ad. News 5908, 5913 (citing Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974)).

4/ See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976) (holding metropolitan areawide relief permissible in case of deliberate racial discrimination in housing).

5/ See, e.g., Columbus Board of Education v. Penick, 443 U.S. 449 (1979) (holding systemwide school desegregation remedy proper on the basis of the lower court's findings and conclusions as to unconstitutional, racially segregative purpose and impact of school board's conduct); Liddell v. Board of Education, 491 F. Supp. 351 (E.D. Mo. 1980), aff'd, 667 F.2d 643 (8th Cir. 1981), cert. denied sub nom. Caldwell v. Missouri, 454 U.S. 1081, 1091 (1981) (holding St. Louis Board of Education and State of Missouri liable for the establishment and maintenance of a racially segregated public school system within St. Louis).

been litigating significant cases on behalf of consumers,^{6/} parents seeking to enforce child support orders,^{7/} juveniles,^{8/} and Black schoolchildren

6/ See, e.g., Consumers Union v. Virginia State Bar, C.A. No. 75-0105-R (E.D. Va. 1975) (settled after suing for right to provide information about law firms in a legal directory without being subject to disciplinary action).

7/ See, e.g., Jenkins v. Massinga, No. M-83-4134 (D. Md. order dated Aug. 3, 1984) (protecting custodial parents' and childrens' right to receive full proceeds from child support awards, without illegal deductions); see also Parents Without Partners v. Massinga, C.A. No. JH-83-4314 (D. Md. consent decree dated Jan. 11, 1984) (state defendants agreed to provide child support enforcement services to all eligible parents in compliance with federal law).

8/ See, e.g., Coleman v. Stanziani, 570 F. Supp. 679 (E.D. Pa. 1983) (holding that plaintiffs challenging constitutionality of Pennsylvania juvenile pretrial detention statutes were not required to exhaust state remedies), appeal dismissed, 735 F.2d 118 (3d Cir. 1984); Cameron v. Montgomery County Child Welfare Service, 471 F. Supp. 761 (E.D. Pa. 1979) (denying summary judgment where "deprived" child alleged failure to provide him with adequate care, treatment, and services which would have enabled him to return home) (case later settled); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977) (denying in part motion to dismiss complaint that conditions and treatment of Youth Study Center deprived juveniles of constitutional rights) (case later settled).

challenging the use of standardized IQ tests to place them in programs for mentally retarded students.^{9/}

Often, Alliance members have been able to enforce their clients' constitutional or statutory rights through a negotiated settlement of litigation.^{10/} However, some cases have proven difficult to conclude through settlement, for a wide variety of reasons. In some of the cases litigated by Alliance members, for example, judicial resolution of an unsettled

9/ See, e.g., Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979).

10/ Settlements were achieved, for example, in Parents Without Partners v. Massinga, C.A. No. JH-83-4314 (D. Md. 1984); Cameron v. Montgomery County Child Welfare Service, 471 F. Supp. 761 (E.D. Pa. 1979); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977); and Consumers Union v. Virginia State Bar, C.A. No. 75-0105-R (E.D. Va. 1975).

question of law has been an important precondition to settlement.^{11/}

The availability of attorney's fees under statutes such as Section 1988 has improved the ability of Alliance members to secure legal services for otherwise unrepresented segments of the public. The statutory fee awards that these nonprofit organizations receive are channeled directly into continuing and when possible expanding the legal representation they offer. Furthermore, the availability of fees may make it easier for these groups to refer cases to other attorneys, including private counsel, when their own limited resources are insufficient. Members of the Alliance thus have a strong interest in the application of Section 1988, since the Court's

11/ See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976) (settled following the Supreme Court's determination of whether and to what extent area-wide relief should be available to remedy deliberate racial discrimination in housing).

interpretation of the statute may well affect their ability to ensure representation for those citizens who need it.^{12/}

For these reasons, the Alliance will address the first issue that is before the Court: Whether Rule 68 of the Federal Rules of Civil Procedure should be interpreted as requiring an attorney's fee sanction against a prevailing civil rights plaintiff who has refused a settlement offer. The Alliance respectfully submits that this issue was correctly decided by the Court of Appeals for the Seventh Circuit when it determined that Rule 68 and Section 1988 do not provide for such an attorney's fee sanction.

^{12/} It is important to note, however, that fee awards do not subsidize these organizations. For the majority of Alliance members, fee awards comprised only one to twelve percent of the organization's 1983 budget.

SUMMARY OF ARGUMENT

Petitioners (and their supporting amici) are urging the Court to adopt a judicial construction of Rule 68 of the Federal Rules of Civil Procedure that will effectively rewrite the Civil Rights Attorney's Fee Awards Act of 1976 (and ninety-one other acts of Congress that the Solicitor General asserts have similar wording). However, neither members of Congress, nor the drafters of the Federal Rules, intended this result. Rather, they intended the term "costs" in Rule 68 to have its traditional meaning, and not to include attorney's fees.

Neither Congress nor the Advisory Committee intended to abrogate this traditional distinction between fees and costs in 1938, or in the forty-six years since the Federal Rules were submitted for Congressional approval. The language in the 1976 Fees Act which refers to

attorney's fees "as part of costs" is not intended to abrogate that distinction; rather it is intended to enable federal district judges to award attorney's fees against state officials notwithstanding the Eleventh Amendment's bar of retroactive relief in the form of damages.

Moreover, the interpretation of Rule 68 that petitioners urge the Court to adopt would be highly inconsistent with Congressional purposes in enacting the Civil Rights Attorney's Fee Awards Act, and would create serious legal, practical, and policy problems as applied to both the 1976 Fees Act and to other fee-shifting statutes.

The petitioners' request for such substantial modifications in the Federal Rules and the 1976 Fees Act should be addressed to Congress, not to the Court. Congress has the institutional competence to weigh competing points of view and

determine whether amendments are warranted, and if so, what their design and scope should be.

In fact, Congress is already considering a request quite similar to the one advanced by petitioners here. This request to amend Section 1988 has generated considerable controversy. During 1981 and 1982 hearings on the proposal, witnesses varied widely on whether and to what extent such an amendment was needed, what its impact might be, and what form it might take. None of the witnesses, however, suggested, as do the petitioners here, that Rule 68, or the 1976 Fees Act, already provided for such an attorney's fee sanction.

Finally, there is no need for the Court to fashion a procedural tool of the type petitioners seek. There has been no demonstration that existing incentives

are inadequate to produce fair settlements in appropriate cases. Furthermore, sanctions are already available under existing case law and statutory provisions for situations in which attorneys litigate in bad faith under fee-shifting statutes, refuse to entertain settlement offers in good faith, or multiply or prolong litigation unreasonably and vexatiously.

ARGUMENT

I. THE TERM "COSTS" IN RULE 68 DOES NOT INCLUDE ATTORNEY'S FEES.

A. The Drafters and Revisers of the Federal Rules of Civil Procedure Have Retained the Traditional Distinction Between Fees and Costs.

There has always been a sharp distinction between costs and attorney's fees under traditional principles of American law. Costs are generally

awarded to the prevailing party unless the court directs otherwise; however, each party bears his or her own attorney's fees unless there is an explicit statutory provision to the contrary. Alveska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Also under traditional principles, although costs are shifted as a matter of course at the close of the litigation, attorney's fees can only be shifted pursuant to defined criteria and are not shifted automatically.

Both the original Advisory Committee that drafted the Federal Rules of Civil Procedure (in 1935 to 1938) and subsequent Advisory Committees revising the rules have retained the traditional distinction between costs and attorney's fees. Where the rules are intended to refer to costs, as in Rule 54, the term "costs" is used. Where the rules are

intended to refer to attorney's fees, the term "attorney's fees" or "expenses, including attorney's fees" is used. See Rules 11, 16(f), and 26(g) (as amended in 1983); and Rules 30(g), 37, and 56(g).^{13/}

This distinction is reinforced by the fact where attorney's fee sanctions (as opposed to cost assessments) are included in the Federal Rules, the Advisory Committee has often made express reference to that fact, and discussed the reasons for the fee sanction in a Committee Note. See, e.g., Advisory Committee Notes (1983 Amendment) to Rules 11, 16(f), and 26(g). Additionally, where the drafters of the Federal Rules

^{13/} The decisions of this Court in Delta Airlines, Inc. v. August, 450 U.S. 346 (1981), and Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), recognize the distinction in the Federal Rules between costs and attorney's fees. These decisions are discussed in detail in the Amicus Brief of the Association of the Bar of the City of New York (Supporting Respondent) at 9-16; that discussion will not be duplicated here.

have included an attorney's fee sanction in the rules, they have provided a precise description of the type of conduct or the degree of culpability necessary to invoke the sanction; none of the Federal Rules include the type of automatic, mandatory fee sanction that petitioners urge here. See, e.g., Rules 7, 8, and 11, and Advisory Committee Notes (1983 Amendment) to Rule 11; Rule 16(f); Rule 26(f) and (g), and Advisory Committee Note (1983 Amendment); and Rule 56(g).

Moreover, nowhere in the 1938 version of the Federal Rules of Civil Procedure, the accompanying Advisory Committee Notes, subsequent amendments to the rules or accompanying Committee Notes, is there any reference to the question of whether or not certain statutes "define attorney's fees as part of costs" (Petitioners' Brief at 11,

18-19), or any reference to the significance of such statutory language in interpreting and applying the Federal Rules. There is, in other words, no historic evidence that the drafters of the Federal Rules were aware of or intended the potential interpretation urged in this case. On the other hand, there is evidence that to the limited extent drafters of the first set of Federal Rules intended to recognize and incorporate statutory provisions relating to costs they did so explicitly. See Advisory Committee Note accompanying Rule 54. No such reference accompanies Rule 68, and this Court should be reluctant to imply that one was intended.

B. Congress, In Its 1938 Approval of the Federal Rules of Civil Procedure, Did Not Amend, Sub Silentio, Existing Fee-Shifting Statutes.

Nor should the Court assume that Congress, simply by its approval in 1938 of the first set of the Federal Rules of Civil Procedure (including Rule 68) intended to modify the fee-shifting statutes it had already enacted, such as the Clayton Antitrust Act (15 U.S.C. § 15), the Interstate Commerce Act of 1887 (49 U.S.C. §§ 8, 16, 908(b) and (e)), or the Copyright Act of 1909 (17 U.S.C. § 40, now codified at 17 U.S.C. § 505), inter alia. As noted above, there is no evidence in either the rules or the legislative materials relevant to their approval to indicate that the Advisory Committee or the Court were recommending such a sub silentio

amendment of existing statutes, notwithstanding the Solicitor General's contentions that such an implied modification of existing statutes must have been intended. Brief of Solicitor General at 12-14.

Nor, for that matter, can one assume that members of Congress even considered the possibility of such a sub silentio amendment of existing fee allocation statutes when they approved the first set of rules in 1938. As Justice Frankfurter pointed out in his dissent in Sibbach v. Wilson & Co., Inc.:

... [L]ittle significance attaches to the fact that [in 1938] the Rules, in accordance with the statute, remained on the table of two Houses of Congress ... and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the

Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.

312 U.S. 1, 18 (1940) (emphasis added). Justice Frankfurter's observations apply with even greater force in the instant case, where the interpretation that petitioners urge Congress "must have intended" could not have been inferred by the legislators from a reading of the rules, but would have required them to also make detailed reference to the exact language of all fee allocation statutes enacted prior to 1938.

Moreover, even if members of Congress had considered the possibility in 1938 that Rule 68 would amend, sub silentio, some existing fee allocation statutes, they would not have approved it. Both proponents of the Rules Enabling Act and members of Congress had, just a few years earlier, articulated

clear limits on the rulemaking powers that the Court would be granted: That power would not include the authority to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072. As Thomas Shelton, the Chair of the ABA Committee on Uniform Judicial Procedure, had explained at hearings on the Rules Enabling Act: "[T]he Supreme Court is not going to hold that it has the power to legislate, and it will confine itself to regulating the detail machinery of the trial courts." Reforms in Judicial Procedure: American Bar Association Bills, Hearings Before the House Judiciary Committee, 63rd Cong., 2nd Sess. 22 (1914); see also H.R. Rep. No. 462, 63d Cong., 2d Sess. 16 (1914) ("the rules will not have the effect or dignity of statutes").^{14/}

^{14/} See generally Burbank, The Rules Enabling Act of 1934, 130 Penn. L. Rev. 1015 (1982).

In light of these factors, it is perhaps not surprising that in the first thirty-seven years following the adoption of the Federal Rules of Civil Procedure there is only one reported case in which a litigant made an argument analogous to the argument advanced by petitioners here. In that case, Gamlen Chemical Co. v. Dacar Chemical Products, 5 F.R.D. 215, 216 (W.D. Pa. 1946), the court rejected the plaintiff's contention that the phrase "with costs then accrued" in Rule 68 had to be read as referring to attorney's fees because the substantive statute provided for an award of attorney's fees "as part of costs."^{15/}

^{15/} In more recent years courts have split on the issue presented in Gamlen Chemical Co., in some cases opining that the Rule 68 phrase does not include attorney's fees (Piquead v. McLaren, 699 F.2d 401 (7th Cir. 1983); Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980) (*dicta*)), and in other cases that it does (Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983); Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Cal. 1979); Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978) (*dicta*)).

It was not until 1982, in the district court proceedings in this case, that a litigant first advanced the attorney's fee sanction argument made here.^{16/} However, as explained below, Congress did not intend either the Civil Rights Attorney's Fee Awards Act of 1976 or other fee-shifting laws to be given the interpretation petitioners urge.

C. Nor Did Congress, in Enacting the Civil Rights Attorney's Fees Act of 1976, Abrogate the Distinction in the Federal Rules Between Fees and Costs.

The petitioners and the Solicitor General have attempted to argue that when

^{16/} But cf. Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976) (court makes a similar suggestion, in dicta); Honea v. Crescent Ford Truck Sales, Inc., 394 F. Supp. 201 (E.D. La. 1975) (same); see also Bitsouni v. Sheraton Hartford Corp., 33 F.E.P. Cases 898 (D. Conn. 1983) (same argument asserted successfully by defendant).

Congress enacted the Civil Rights Attorney's Fee Act of 1976, it implicitly adopted an attorney's fee cutoff for refusing a settlement offer (under Rule 68) because it chose language referring to attorney's fees as part of costs. Petitioners' Brief at 18-19; Solicitor General's Brief at 6-8. However, they have not cited and can not cite any historical evidence or pertinent portions of the legislative history to support their argument.

The legislative history of the 1976 Act, important in the consideration of this case, is discussed in detail in the Respondent's Brief, and in the Amicus Briefs of the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Education Fund, Inc. (in Respondent's Support). That detailed discussion will not be repeated here. Suffice it to say that several issues

surrounding the settlement of civil rights litigation were considered during legislative deliberations. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912 [hereinafter cited as Senate Report]; H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) [hereinafter cited as House Report]. However, there was no consideration of either Rule 68 or any other provision in the Federal Rules of Civil Procedure, and no suggestion that attorney's fees should be reduced or limited if a civil rights plaintiff rejected a settlement offer. Moreover, the legislative history of the Act contains a detailed, comprehensive explication of the factors for a court to consider in setting a fee award (see, e.g., Senate Report at 6), and nowhere in that discussion is there any reference to either Rule 68, or any other Federal

Rule, or to any possibility of reducing attorney's fees if a client rejects a settlement offer.

The only basis for the petitioner's (and the Solicitor General's) assertion that Congress intended to adopt a fee cutoff is the legislators' choice of the following words: "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. However, there are references in the legislative history explaining why Congress chose this particular terminology. Congress sought, as this Court recognized in Hutto v. Finney, 437 U.S. 678 (1978), to enable federal district judges to award attorney's fees against state officials notwithstanding the Eleventh Amendment's bar of retroactive relief in the form of damages. Id.; see also Senate Report at

5; House Report at 7.^{17/}

Contrary to the assertions of the Solicitor General, the fact that Congress chose this terminology to abrogate Eleventh Amendment immunity does not imply that it chose simultaneously to incorporate the mechanical provisions of an obscure Federal Rule of Civil Procedure. Rather, it suggests simply that Congress chose this terminology for a single, limited purpose, and that the words of the statute are not meaningless or superfluous (as the Solicitor General tries to suggest, Brief at 9) or to be given a different reading from the one Congress intended. As the Fifth Circuit explained in Gates v. Collier, in

^{17/} Historically, an award of attorney's fees had often been considered an element of damages, not an element of costs. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 249 n.21 (1975); see also Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983), cert. granted, 104 S. Ct. 2149 (1984).

weighing analogous arguments that since Congress "defined attorney's fees as part of costs" plaintiffs should be able to recover interest on their fee award:

[W]hile it is true that § 1988 also defines attorneys' fees as part of costs, see note 9, supra, the legislative history makes clear that this was done for one reason and one reason only: to ensure that the Eleventh Amendment is no bar so that these fees are recoverable against Government officials acting in their official capacity.

616 F.2d 1268, 1276 (5th Cir. 1980), reh'g granted, 636 F.2d 942 (1981).

Hence, there is no legislative support for the interpretation petitioners urge.

D. Nor Has Congress Abrogated the Rules' Distinction Between Fees and Costs by Enacting Other Fee-Shifting Statutes in Recent Years.

The fact that Congress has used similar language referring to attorney's fees as part of costs in some of the

other fee-shifting statutes enacted in the years since 1938 does not, by implication, abrogate the traditional distinction between fees and costs adhered to in the Federal Rules. Rather, it illustrates some of the difficulties inherent in adopting petitioners' position.

The Solicitor General asserts, albeit with a margin of error,^{18/} that seventy-two of the one hundred sixteen

^{18/} The Solicitor General errs in characterizing certain of the statutes in Part I of his Appendix as "Statutes Awarding Attorneys' Fees as Part of Costs." Some of the statutes listed in Part I are in fact worded to refer to "costs and expenses (including attorney's fees)," (emphasis added). See, e.g., Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d). Statutory language of this type suggests, contrary to the argument advanced by the Solicitor General, that fees are not considered as part of costs, but rather as part of a separate item referred to as "expenses," in the same terminology used frequently in the Federal Rules of Civil Procedure. See discussion of terminology used in the Federal Rules at pages 12-16, above.

federal fee-shifting statutes enacted since 1938 contain language similar to that used in Section 1988. Brief of Solicitor General, Appendix, at 1a-9a.

Hence, if the arguments advanced by the petitioners and the Solicitor General are correct, then numerous other fee-shifting statutes will have to be construed as mandating sizeable attorney's fee sanctions for rejecting a Rule 68 offer of judgment. In fact, this seems to be the result that the Solicitor General seeks. However, there is no legislative history or historical evidence indicating that Congress intended such a result when it enacted these statutes. The legislative materials that do exist suggest that the interpretation urged by petitioners and the Solicitor General would be inconsistent with the fee allocation mechanisms and the statutory objectives

of many of these laws.

For example, such an interpretation would undermine the incentives for enforcement litigation that Congress intended when it enacted fee-shifting provisions as part of a number of environmental protection laws. See, e.g., Clean Air Act (42 U.S.C. § 7607(f)); Endangered Species Act of 1973 (16 U.S.C.A. § 1540(g)(4)); and Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. (Supp. V) § 1349(a)(5)). Provisions of this type were designed to encourage citizens to bring enforcement lawsuits and thereby perform a public service. See, e.g., Senate Report on the Clean Air Act, S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970).

But those incentives would be destroyed by an interpretation of the type urged here by the petitioners and the Solicitor General, in this way: The

fee allocation sections of these environmental statutes contain terminology (similar to that in Section 1988) referring to fees as part of costs. However, unlike the wording of Section 1988, the language of these laws which allows for a discretionary award of fees to a party does not include an express requirement that the party requesting fees prevail in the lawsuit.^{19/} Thus, if the requirements of Rule 68 are "read together" with the language of these environmental laws, in a manner analogous to that urged in the instant case, the result may be that an environmental plaintiff who rejects a settlement offer and then fails to recover a judgment as favorable as the offer will suffer a double sanction. He will not only be

^{19/} But see Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983) (holding that Congress intended fee awards to be reserved for successful plaintiffs).

unable to recover his own attorney's fees, but also may be liable for the defendant's attorney's fees, from the date of the offer's refusal to the close of the litigation. This is hardly the type of result that Congress contemplated when it drafted the fee-shifting provisions in these environmental statutes.

E. "Plain Meaning" Tenets of Statutory Construction Do Not Compel a Reading of Attorney's Fees as Part of Costs Under the Federal Rules.

Petitioners and the Solicitor General repeatedly contend that when Section 1988 and other fee-shifting statutes are interpreted in accordance with their "plain meaning" the result must be the imposition of an attorney's fee sanction under Rule 68. Petitioners' Brief at 11; Solicitor General's Brief at

3-4, 9-10. However, there are two central fallacies in this assertion.

First, by their apparent reliance upon the "plain meaning" of brief excerpts from the statutory language, petitioners and the Solicitor General fail to recognize the importance of the overall statutory scheme and the legislative history of each of the fee-shifting statutes. As this Court has often recognized, a particular interpretation may appear to be within the letter of a statute, and yet not be correct because it is not within the spirit of the statute or the intention of its makers. See United Steelworkers v. Weber, 443 U.S. 193, 201 (1979), quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). Careful review of legislative materials and the purposes and policies reflected in them has long been the hallmark of this Court's

statutory analysis. See, e.g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47-48 (1928). Conclusory references to abbreviated excerpts from statutory language, of the type urged by the Solicitor General here, should not be substituted for a thorough review of Congressional enactments and policies.

Second, petitioners and the Solicitor General err in contending that tenets of statutory construction compel a reading of attorney's fees as part of costs under the Federal Rules. The "plain meaning" principle of statutory construction, which suggests interpreting the language of a statute in accordance with its ordinary meaning and usage, is based on the assumption that the legislators were fully aware of the ordinary meaning of the words they chose

to employ, and purposeful in their choice. One cannot assume in the instant case, however, that members of Congress in any way intended their use of the word "costs" in statutory language to be accorded the particularized meaning it would have in petitioners' Rule 68 interpretation.

There is a "plain meaning" of costs in the Federal Rules of Civil Procedure, and it is the traditional definition that does not include attorney's fees. Additionally, there are a series of carefully-articulated, and varying, fee mechanisms that Congress has chosen to encourage enforcement of federal statutory policies. Those mechanisms do not include, in any instance, sanctions for rejecting a settlement offer.

What petitioners (and the Solicitor General) seek from this Court is not a simple "interpretation" of the terms

"costs" and "fees" as used in the Federal Rules of Civil Procedure and of Section 1988. Clear, unambiguous, and longstanding interpretations of the terms used in these contexts already exist. Rather, petitioners are seeking a judicial construction that will effectively amend the Civil Rights Attorney's Fee Act of 1976, and according to the Solicitor General, ninety-one other Congressional enactments also. This would be a drastic step for the Court to take, one that would raise many additional questions and problems, and one more appropriately reserved for legislative consideration.

II. THE ISSUE RAISED IN THIS CASE
IS APPROPRIATE FOR LEGISLATIVE,
NOT JUDICIAL, RESOLUTION.

When, as in this case, there is an established, longstanding construction of an existing statute or rule, the responsibility for rewriting the statute

or rule lies with Congress, not with the Court. See, e.g., Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). The Court should not reinterpret the statute or rule in a manner that effectively amends it, particularly when (as here) Congress already has the question of whether such an amendment is advisable under active consideration.

These principles apply with particular force in the instant case because the modification of fee allocation rules is a Congressional responsibility. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); see also Blum v. Stenson, 104 S. Ct. 1541 (1984).

Moreover, it is also important to recognize Congress' superior institutional competence in this instance because the procedural modifications urged by petitioners will have a

significant effect on the assertion of substantive rights under the Constitution and federal laws. See Patsy v. Board of Regents, 457 U.S. 496.

In fact, the possibility of an amendment in the 1976 Fees Act to accomplish precisely the result petitioners urge here is being extensively debated in Congress. Proponents and opponents of the measure differ sharply on its policy implications, and about whether or not there is a need for it. The record of Congressional consideration and debate underscores the fact that this matter is appropriate for legislative rather than judicial resolution.

Senator Hatch first proposed the measure during a series of hearings held in 1981 and 1982 to consider amendments in Section 1983 and Section 1988. See Attorney's Fees Awards: Hearings on

S. 585 (and on Amendments to Be Proposed by Senator Orrin G. Hatch) Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 12-13 (Comm. Print 1982) [hereinafter cited as 1982 Hearings]; see also Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 1st Sess. (Comm. Print 1981) [hereinafter cited as 1981 Hearings]. After the hearings, the 97th Congress took no further action on the proposal. In the first session of the 98th Congress, Senator Hatch included an identical proposal in S. 141, a bill including both a "good faith" defense for municipal governments sued under Section 1983 and a number of additional limitations on attorney's fee awards under Section 1988.

S. 141, 98th Cong., 1st Sess., 129 Cong. Rec. S636 (daily ed. Jan. 26, 1983). No hearings on the bill were held and no other action was taken.

Now, in the second session of the 98th Congress, the Administration has requested a similar fee limitation proposal as part of an omnibus attorney's fee bill. H.R. 5757, 98th Cong., 2d Sess. (1984) ("The Legal Fees Equity Act"); S. 2802, 98th Cong., 2d Sess., 130 Cong. Rec. S8498-8500 (daily ed. June 27, 1984). Hearings on the Administration proposal, which may differ slightly from Senator Hatch's earlier bill in its design and scope, were just held by the Subcommittee on the Constitution of the Senate Committee on the Judiciary on September 11, 1984.

As mentioned above, the 1981 and 1982 hearings reflected a wide divergence of opinion on whether there was a need to

increase settlement incentives in civil rights litigation. Witnesses varied considerably in their views on whether and to what extent parties had been able to reach settlement agreements in civil rights cases, and as to what factors and which parties were responsible for the fact that some cases were not settled. Several city attorneys responsible for defending Section 1983 actions claimed that plaintiffs' attorneys sometimes prolonged litigation in order to increase their fee entitlement (1981 Hearings, supra p. 39, at 290, 500, 502-03; 1982 Hearings, supra p. 38, at 7, 90-91, 109), but they gave no specific examples of cases in which plaintiffs rejected reasonable settlement offers.

Other witnesses pointed out that for plaintiffs and their counsel the possibilities of losing a case altogether, failing to recover either

damages or attorney's fees, and facing potential liability for costs already furnished substantial disincentives for refusing a reasonable settlement offer. 1981 Hearings, supra p. 39, at 614-15, 619-20; 1982 Hearings, supra p. 38, at 20, 50-51. In some cases, witnesses reported, government defense attorneys were responsible for prolonging litigation by refusing reasonable settlement offers.^{20/} In general, the

^{20/} Fletcher Farrington, a private practitioner from Georgia, described a case in which a nearby county, against the advice of its lawyers, refused a plaintiff's offer to settle for \$8,000. The case went to trial, and the jury returned a verdict of \$74,000. 1982 Hearings, supra p. 38 at 44, 48.

Stephen Ralston of the NAACP Legal Defense Fund described a major case against Georgia State Prison officials which continued for seven years and took twenty weeks to try. Finally, after the trial, because of encouragement from the judge, incidents at the prison, and a change in defense counsel, the State agreed to settle the case on basically the same terms that the plaintiffs had offered before the case went to trial. 1981 Hearings, supra p. 39, at 612-13.

legislative record on these settlement issues, as on a number of other attorney's fee issues, was far from conclusive. Both Senator Hatch (who chaired the Hearings) and former Congressman Drinan (who had served as floor manager for the 1976 Fees Act) commented on the need for fuller documentation of the problems alleged. 1981 Hearings, supra p. 39, at 326; 1982 Hearings, supra p. 38, at 72-73.

The fact that, as recently as 1982, members of Congress did not believe they had a sufficient record to address this policy dispute bespeaks the need for legislative deliberation on the matter. As the Court explained in Patsy v. Florida Board of Regents, 457 U.S. at 513-15, when it rejected a request that it reinterpret Section 1983 to require exhaustion of state administrative remedies, the policy issues inherent in

such requests are best addressed by Congress. In language that might well apply also in the instant case, the Court cautioned that:

[T]he relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.

Id. at 513 (footnotes and citations omitted).

Furthermore, in the instant context as in Patsy, serious questions have been raised not only about whether there is a need to amend the law, but also about the design and scope of the proposed amendment. For example, Neil Bradley, testifying against the proposal during

the 1982 hearings (on behalf of the American Civil Liberties Union), pointed out the difficulty of predicting the outcome in some cases because an attorney would not have received detailed facts from discovery responses at the time of the settlement offer, and in other cases because statutory provisions, case law, or witnesses' recollections might change between the time of the offer and the time of trial. 1982 Hearings, supra p. 38, at 17-18, 29-31. Bradley also noted that situations might well arise in which an attorney would recommend settlement, a client could refuse, and that attorney would nevertheless be obligated to continue representing that client on a meritorious claim, but without any compensation for his or her services. Id. at 17. In this situation, as in the situation in which an attorney is asked to simultaneously negotiate a

settlement of his or her own fees and a settlement of the merits of a client's claim, Bradley emphasized the potential for ethical problems. Id. at 17-18, 29-31.

Fletcher Farrington, a private practitioner from Southern Georgia who had handled civil rights cases for both plaintiffs and defendants under Section 1983, also testified against the proposed amendment to Section 1988. 1982 Hearings, supra p. 38, at 52. Farrington pointed out that a determination (pursuant to the proposed statutory language) of whether the relief embodied in a final judgment was as favorable as that tendered in a settlement offer would often require collateral, case-by-case litigation. Id. Farrington also expressed concern about the ethical problems the proposed amendment would engender, and suggested that the

available cost sanctions under Federal Rule of Civil Procedure 68 were already working to discourage unnecessary litigation, without provoking the kinds of attorney-client conflict likely to result from an attorney's fee sanction. Id.^{21/}

As this testimony suggests, the practical and policy issues surrounding the imposition of an attorney's fee sanction are more appropriate for legislative than judicial determination. The Court weighed similar factors in Patsy v. Board of Regents, and observed:

These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the

^{21/} None of the witnesses testifying at the 1981 or 1982 hearings took the position that either Rule 68 or Section 1988 already provided for an attorney's fee sanction of the type urged by petitioners here.

judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.

457 U.S. at 514. In the instant case, a determination to impose attorney's fee sanctions for rejecting a settlement offer will engender a similar series of collateral substantive and procedural questions with important policy implications.

The difficulty of these issues will be compounded by the fact that an interpretation of Congressional purposes and fee allocation mechanisms is not just one, but several dozen varying statutory schemes will be required. Although the Alliance for Justice (as amicus curiae) respectfully submits that it is important for the Court to be cognizant of these policy issues, their resolution is best reserved for Congress to consider.

III. THE INTERPRETATION URGED BY THE PETITIONERS WILL ENGENDER MANY PROBLEMS.-----

If the Court adopts the interpretation of Rule 68 and numerous fee-shifting statutes urged by the petitioners and the Solicitor General, there will be a wide variety of problems in refining that interpretation and administering the fee sanctions which will result. Many of these problems, such as applying the rule to class actions and cases involving declaratory or injunctive relief, are explained in the briefs of other amici supporting respondents. Several others, however, merit mention here.

A. Under Rule 68, Plaintiffs and Their Counsel Must Forfeit All Fees for Post-Offer Services, Regardless of Their Reasonableness and Good Faith in Rejecting the Offer.

The attorney's fee sanction petitioners seek would apply automatically, under the terms of Rule 68, whenever a plaintiff refuses a settlement offer and then fails to obtain a judgment that is as favorable. However, such an automatic fee cutoff or fee-shifting sanction will be highly inequitable in many circumstances, penalizing the plaintiff (and his or her counsel) for a reasonable, good-faith decision to continue litigating. As the Court observed in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978):

[S]eldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's

claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bring suit.

Recently, the Justice Department made the same point in a letter questioning a proposal by the Advisory Committee on the Federal Rules of Civil Procedure to expressly amend Rule 68 to include fee cutoff and fee-shifting sanctions: "[E]valuating litigation hazards is an extremely difficult task in any suit." Letter from D. Lowell Jenson, Acting Deputy Attorney General to the Honorable Edward T. Gignoux, Chair, Committee on Rules of Practice and Procedure, February 28, 1984 (copy on file at the Administrative Office of the United States Courts).

Moreover, in many cases it is likely that the margin between the rejected offer and the judgment obtained will be relatively small. The instant case is a good example: Petitioners assert that their offer was for \$100,000 (inclusive of attorney's fees); the respondent ultimately recovered \$92,000 (a verdict of \$60,000 in damages and pre-offer fees in the amount of \$32,000). It is unfair to penalize plaintiffs who have litigated in good faith under such circumstances. Members of the Advisory Committee, in a draft Note accompanying their recent proposal to include attorney's fee sanctions in Rule 68, termed such an "all or nothing" rule of this type "Draconian" in its impact. 98 F.R.D. 337, 365 (1983).

B. The Petitioners' Interpretation of Rule 68 Will Engender Substantial Litigation on Collateral Issues.

Faced with such drastic fee sanctions, both parties and their counsel are likely to raise a substantial number of problems and issues in collateral litigation: For example, was the Rule 68 offer valid in its form? Was the judgment obtained actually less favorable than the rejected offer, particularly insofar as either the offer or judgment (or both) included declaratory or injunctive relief? What effect, if any, should the rejection of a reasonable counter-offer have on the imposition of sanctions?

Moreover, many litigants will assert, as the petitioners and the Solicitor General imply throughout their briefs, that notwithstanding the mandatory terminology used in Rule 68, a

court's imposition of fee sanctions for refusing a settlement offer should be discretionary, and based either on the "reasonableness" of the offer or the "unreasonableness" of its rejection. Even assuming, arguendo, that Rule 68 can be construed as providing a district judge with discretion to deny an attorney's fee sanction, additional questions and difficulties (of the type described below) will arise in collateral litigation. This litigation will require a substantial use of judicial resources on non-substantive issues, and prove problematic for judges, parties and their attorneys. Neither Rule 68 nor Section 1988 contain any standards to guide the courts in addressing these questions. For example, if a plaintiff seeking to avoid the imposition of Rule 68 sanctions must demonstrate that the rejection of an offer was reasonable at the time it was

made, that plaintiff or his or her attorney may be forced to reveal privileged attorney-client communications or confidential work product material. This is particularly problematic if an appeal or related cases are still pending.

However, if the district judge postpones attorney's fee proceedings until after an appeal or the conclusion of related litigation it will be virtually impossible to determine the "reasonableness" of the rejection of the settlement offer. As Justice Rehnquist observed in his dissenting opinion in Delta Airlines, Inc. v. August,

To import into the mandatory language of Rule 68 a requirement that the tender of judgment must be "reasonable" or made in "good faith" not only rewrites Rule 68, but also puts a district court in the impossible position of having to evaluate such uncertain and

nebulous concepts in the context of an "offer of judgment" that may in many cases have been made years past.

450 U.S. at 369 (1981).

Additionally, the adoption and administration of fee sanctions as urged by petitioners and the Solicitor General will greatly increase the potential for conflict in the attorney-client relationship, for several reasons. First, the kinds of disclosure problems outlined above will surface frequently, and will require a difficult balancing of competing interests.

Second, because the petitioners and the Solicitor General urge this Court to construe Rule 68 in a manner that would appear to require simultaneous negotiation of the merits and the fee award, and because the stakes for the attorney will be higher than they are now, the existing

potential for conflict between an attorney and client in this situation will be exacerbated. Although the problems of simultaneous negotiation have been widely recognized (see, e.g., Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980), cert. denied sub nom. Sanchez v. Tucson Unified School District, 450 U.S. 912 (1981); Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977); see also Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of the New York City Bar Association, 36 Record of the N.Y.C.B.A. 507 (1981)), no satisfactory solutions have been identified.^{22/}

Third, there will be further conflict resulting from the fact that the rules of professional responsibility require a lawyer to "abide by a client's

^{22/} See the discussion of this issue in the Amicus Brief filed by the NAACP Defense and Educational Fund, Inc. (in Respondent's Support).

decision whether to accept an offer of settlement of a matter..." (ABA Model Rules of Professional Conduct, Rule 1.2(a); emphasis supplied), but the sanctions petitioners are seeking for the refusal of an offer will fall most heavily on the attorney (who in some instances may have even recommended that his or her client accept the settlement offer). These problems will prove difficult, if not insurmountable, for the courts and will gradually and increasingly deter attorneys from accepting cases covered by the fee-shifting statutes.

IV. THE RULE URGED BY PETITIONERS IS NOT NECESSARY TO CURB ANY ALLEGED LITIGATION PROBLEMS.

Petitioners and the Solicitor General are proposing a remedy for what they allege are litigation problems under fee-shifting statutes. However, they

have failed to demonstrate that the problems they allege in fact exist or are serious enough to warrant the drastic measure they propose. They have failed to show, for example, that the respondent in this case acted unfairly or unreasonably; a careful review of the facts surrounding the settlement offer would seem to suggest just the contrary. See Statement of the Case in Respondent's Brief. Moreover, they have failed to demonstrate that civil rights plaintiffs or plaintiffs under fee-shifting statutes generally act unfairly or unreasonably in considering settlement offers.

In many cases, civil rights and public interest plaintiffs have fairly and successfully negotiated settlements.^{23/} There is no evidence

^{23/} See the case examples, cited supra pp. 6-7 nn. 10, 11.

that the incentives to do so are inadequate. As the Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, observed in opposing the recent Advisory Committee proposal to increase Rule 68 sanctions:

It has been my experience that the economic incentives to accept reasonable offers are generally more than sufficient in the settlement of cases. While it is true that sometimes reasonable offers may be rejected by a party, these are only in exceptional matters. I do not believe a rule change so sweeping as proposed in the above amendment to Rule 68 is required or even desirable.

Instead of improving the efficiency of our Courts, the proposed amendments may actually add an additional responsibility on an already overburdened judiciary.

Letter from the Honorable James McGirr Kelly to the Committee on Rules of Practice and Procedure, December 14, 1983
(copy on file at the Administrative

Office of the United States Courts).

Existing law already provides district courts with authority (and guidance) to curb abuses if and when attorneys litigate in bad faith under fee-shifting statutes, or refuse to entertain settlement offers in good faith. Case law provides that in such circumstances a fee award may be refused altogether. Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980); Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977).^{24/}

However, the courts that have considered the matter have been careful to note that the rejection of a settlement offer may well be fair and reasonable, and should not, in and of itself, be a basis for denying attorney's

^{24/} See also the provisions in 28 U.S.C. § 1927 (as amended in 1980) for sanctioning attorneys who multiply or prolong litigation unreasonably and vexatiously.

fees. Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980); Mid-Hudson Legal Services v. G. & U., Inc., 465 F. Supp. 261, 267 (S.D.N.Y. 1978).

It is logically unsound, and unfair, to make the decision about whether or not to accept a settlement offer the sole or even the primary basis for sanctioning an attorney when the rules governing professional responsibility provide for the client to make that choice. The decision about whether or not to settle is often a difficult one, and one which ultimately should be reserved for the client to make.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether those attorney's fees of a civil rights plaintiff which are incurred after an offer of judgment (Fed. R. Civ. P. 68) can be recovered from the defendant under the Civil Rights Attorney's Fees Awards Act (Title 42 U.S.C. Section 1988), even when the plaintiff rejects the Rule 68 offer of judgment whether or not he then fails to recover an amount in excess of the defendant's offer.
2. Whether a defendant may avail himself of the operation of Rule 68 to bar the plaintiff's recovery of attorney's fees (under Title 42 U.S.C. Section 1988) for services performed by his attorney after the offer when the offer ambiguously lumps the substantive relief, attorney's fees and costs together in one sum and when the sum of all of those components finally obtained and accrued after trial exceeds the amount of the offer made pursuant to Rule 68.
3. Whether this Court should hear the question of the reasonableness of an attorney's fee award request to be made pursuant to Title 42 U.S.C. Sec. 1988, when the question has not properly been raised below, when the district court has made no rulings on the reasonableness of any pending fee requests and when this Court has heretofore given the district courts explicit guidelines to follow when ruling on such attorney's fee requests.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE, *Petitioners,*
vs.
ALFRED W. CHESNY, *Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE RESPONDENT

JURISDICTION

The jurisdiction of the Seventh Circuit Court of Appeals was based upon Title 28 U.S.C. Sec. 1294(1). The jurisdiction of the District Court for the Northern District of Illinois was grounded upon Title 28 U.S.C. Sec. 1331(a) (federal question). This Court has granted a Petition for Writ of Certiorari pursuant to Title 28 U.S.C. Sec. 1254(1).

ADDITIONAL STATEMENT OF THE CASE

The respondent, Alfred W. Chesny, is the administrator of the estate of his son, Steven Chesny, deceased. Steven Chesney was shot and killed by the petitioners, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode who, as police officers employed by the Village of Berkeley, Illinois, responded to a domestic disturbance call. On October 5, 1979, the respondent filed a civil rights action against the petitioners, the Village of Berkeley, the Village president and its police chief.

Before the close and completion of discovery and 12 days prior to a scheduled pre-trial conference, the petitioners served upon respondent's attorney an offer of judgment (J.A. 3,4). The offer, dated November 5, 1981, stated as follows:

"Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, hereby offers to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees of One Hundred Thousand (\$100,000) Dollars (J.A.17).

Ten days expired without respondent having served a written notice of acceptance on the petitioners.

After trial, respondent submitted an amended motion for attorney's fees and costs, including secretarial services in the amount of \$171,692.47 for both pre-offer and post-offer services. (J.A. 9) Judge Shadur denied the motion as to the post-offer portion of fees and rejected the request for certain items of costs. Respondent submitted a revised request for pre-offer fees and costs totaling \$34,392.35. Pursuant to Judge Shadur's prompt-

ing, petitioners and respondent, in lieu of an evidentiary hearing, agreed on a figure of \$32,000 to represent respondent's costs and fees accruing prior to the offer of judgment. (J.A. 10).

Respondent demanded payment of post-offer attorney's fees inasmuch as Rule 68 did not apply to attorney's fees and, nonetheless, the judgment finally obtained, which included attorney's fees and costs, as did the offer, at \$231,692.47, exceeded the \$100,000 offer.

In its Memorandum Opinion of September 3, 1982, the district court denied respondent's request for post offer of judgment attorney's fees. (J.A. 24). Judge Shadur held that the term "costs" as found in Rule 68 includes attorney's fees as provided for in Title 42 U.S.C. Section 1988. (J.A. 25). Judge Shadur, after misreading the offer, held that the judgment finally obtained was less favorable than the offer. He believed that the offer was for a sum of \$100,000 plus costs and attorney's fees, thus comparing only the verdict with the offer. (Pet. A.).

Respondent appealed the case to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals reversed the district court. *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983).

Petitioners filed a Petition for Rehearing with suggestion for Rehearing In Banc. (J.A. 26). In the petition, petitioner's sole argument and concern was that respondent might be awarded an unreasonable attorney's fee on remand. (J.A. 36). Petitioners suggested they had not earlier waived this issue on appeal because they first learned of respondent's contingent fee arrangement with

his attorney during oral argument on appeal. (J.A. 31). In fact, as recanted in Judge Shadur's Memorandum Opinion of September 3, 1982, Mr. Chesney's attorney at trial, James D. Montgomery, stated in sworn affidavit that his fees were contingent upon the outcome of this case and Section 1988 (J.A. 25). Furthermore, petitioners were given an opportunity to request an evidentiary hearing to inquire into issues regarding reasonableness of respondent's attorney's fee request. (J.A. 9). Petitioners opted against such hearing and reached a compromise to pay \$32,000 as pre-offer attorney's fees and costs. (J.A. 24).

SUMMARY OF ARGUMENT

The Petitioner served a Rule 68 offer of judgment on the respondent prior to trial in the district court. The district court held that respondent was not entitled to post-offer of judgment attorney's fees since the Rule 68 cost shifting provisions applied to Section 1988 attorney's fees. The Seventh Circuit reversed the district court.

Although Rule 68 operates to shift costs when an offer exceeds a judgment and Title 42 U.S.C. Section 1988 awards attorney's fees to a prevailing party, Rule 68 cannot be said to apply against those attorney's fees as well. Rule 68 was intended to shift only traditional costs in accordance with the "American Rule" of practice. Its drafters expressed no concern for shifting attorney's fees although there were a number of attorney's fees statutes prevalent between 1934 and 1938. Indeed, this Rule was of such obvious impact against traditional costs alone that the Advisory Committee failed to furnish the bar with any explanatory comments.

When Title 42 U.S.C. was enacted in 1936, Congress again displayed no inclination toward the possible operation of Rule 68 against attorney's fees. Indeed, if anything at all, Congress expressed the immensely important purpose in passing the 1976 Act of providing the low income private citizen an avenue of relief and vindication of infringements of their constitutionally protected civil rights.

While Rule 68 serves an important purpose in contributing to the settlement of lawsuits it cannot be said to be so important as to stymie legislation as far reaching as Section 1988. If Rule 68 were held to apply to attorney's fee statutes, an unjustifiable two-tier system of federal cases would result. Furthermore, for the low income private citizens, the courtroom door might become forever closed in civil rights matters. The urgent national policy of protecting the civil rights of private citizens must supercede any proposed extension of Rule 68 as a fee shifting mechanism.

The petitioners served a lump sum offer upon the respondent affording no basis for the respondent to effectively heed the ambiguous offer. For petitioners to avail themselves of Rule 68, they must comport with the Rule and separate the substantive relief portion of the offer from all other components.

Because the offer included costs and attorney's fees components in the lump sum offer figure, the judgment finally obtained necessarily includes those components through trial as well. Accordingly, the respondent's judgment finally obtained exceeded the offer.

Petitioners have argued that this Court should review respondent's attorney's fee contract with his attorney and give the district court guidelines to follow in awarding respondent attorney's fees. Respondent advances this argument here without having raised it in the lower court. Furthermore, this Court has on a number of occasions (some recent) given the district court very sound guidelines within which to exercise their discretion in awarding fees. Finally, there is nothing improper about respondent's agreement with his attorney warranting review.

ARGUMENT

I. ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 ARE NOT COSTS WITHIN THE MEANING OF RULE 68.

The definition of "costs" in Rule 68 of the Federal Rules of Civil Procedure should not be construed to include attorney's fees under 42 U.S.C. Sec. 1988.

A. THE DRAFTERS OF THE FEDERAL RULES OF CIVIL PROCEDURE NEVER INTENDED RULE 68 TO OPERATE AGAINST ATTORNEY'S FEE AWARDS.

Petitioners have advanced the idea that the plain meaning of "costs" within Rule 68 and Title 42 U.S.C. Section 1988 requires a conclusion that Rule 68 was designed to operate against attorney's fees. Circuit Judge Posner stated that this is a result reached through a mechanical linking process. *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983). Petitioners have urged that "costs" in both Rule 68 and Section 1988 must comport in meaning in order to give true substance to those statutes.

The plain meaning rule raised by petitioners is a rule of experience rather than a rule of law. *Watt v. Alaska*, 451 U.S. 259 (1981). As such, it has always been subservient to a truly discernable legislative purpose. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *District of Columbia v. Orleans*, 406 F.2d 957 (D.C. Cir. 1968). Statutes must be viewed in their proper context, considering the logic of Congress and the broad national policy prompting the legislation. *Argosy Limited v. Hen-*

nigan, 404 F.2d 14 (5th Cir. 1968). In construing "costs" as found in Rule 68 and Section 1988, we must avoid linguistic seriation and draw upon the history and policies under the legislation of those statutes.¹

In 1934 Congress authorized the United States Supreme Court to draft rules of procedure that would promote uniformity and consistency throughout the several states. Rules Enabling Act, ch. 651, Secs. 1,2, 48 Stat. 1064 (1934) (Current version at 28 U.S.C. § 2072 (1982)). The Court appointed an advisory committee to conduct hearings, receive comments and make explanatory notes regarding the proposed rules. See Hopkinson, *The New Federal Rules of Civil Procedure Compared With the Former Federal Equity Rules and the Wisconsin Code*, 23 Marq. L. Rev. 159 (1939). The rules became the subject of any commentaries. See ABA, *Rules of Civil Procedure for the District Courts of the United States*, 337-38 (1938). The Advisory Committee published copious notes regarding the rules. *Notes of the Advisory Committee on the Federal Rules of Civil Procedure*, H. Doc. No. 588, 75th Cong., 3d Sess. (1937). H. R. Rep. No. 2743, 75th Cong., 3d Sess. (1938). Rule 68, however, was

¹ Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, sources of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. *Watt v. Alaska*, supra at 266 n.9; *Cabell v. Markham*, 148 F.2d 737 739 (2nd Cir.) (L. Hand, J.), aff'd, 326 U.S. 404 (1945).

merely cross referenced to three state statutes whence it was borrowed.² Thus, the drafters of Rule 68 could draw on no historical basis for considering the impact of the rule on attorney's fee awards. Congress passed the rules without making comment on Rule 68, and little case law developed on the issue until 37 years later.³

² 2 Minn. Stat. Section 9323 (Mason, 1927); 4 Mont. Rev. Code Ann. Section 9770 (1935); N.Y.C.P.A. Section 177 (1937).

³ The first case discussing attorney's fees in the context of Rule 68 was actually *Gamlen Chemical Co. v. Dacar Chemical Products Co.*, 5 F.R.D. 215 (W.D. Pa. 1946). In that case the court rejected a claim what the word "costs" found in Rule 68 does not include attorney's fees under 42 U.S.C. Section 1988. Cf. *Cruz v. Pacific American Insurance Corp.*, 337 F.2d 746 (9th Cir. 1964).

A litany of cases arose after 1975; some rejecting petitioners arguments; *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir. 1983); *Association of Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 495 (D.N.D.), aff'd and modified, 713 F.2d 1384 (8th Cir. 1982); *Greenwood v. Stevenson*, 88 F.R.D. 225 (D.R.I. 1980) (dicta); and others supporting them; *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir. 1983); *Bitsouni v. Sheraton Hartford Corp.*, 33 F.E.P. Cases 898 (D. Conn. 1983); *Waters v. Heublein, Inc.*, 485 F.Supp. 110 (N.D. Cal. 1979); *Scheriff v. Beck*, 452 F.Supp. 1254 (D. Colo. (1978)) (dicta); *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661, 667 (E.D. La. 1976) (dicta); *Honea v. Crescent Ford Trust Sales, Inc.*, 394 F.Supp. 201, 202 (E.D. La. 1975) (dicta).

Surely had Congress, the Courts and the Bar understood and intended Rule 68 to apply against attorney's fee awards, litigation would have occurred immediately after the enactment of the Rules since there were already a number of attorney's fee award statutes in effect. See *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 260 n.33 (1975).

Understandably, problems of interpretation of the rules would be raised and settled only after the rules became operative. See Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937).

No clear definition of "costs" in Rule 68 has developed since its inception. Although there were notable exceptions, "costs" generally did not include attorney's fees when the rules were drafted. *Delta Air Lines v. August*, 450 U.S. 346 (1981) (Rehnquist, J., dissenting); See Payne, *Costs in Common Law Actions*, 21 Va.L.Rev. 397, 405 (1935). The legislative history of Rule 68 shows that "Congress did not intend to deviate from the common meaning of costs as the term was used in 1938". *Delta Air Lines*, 450 U.S. at 378. The drafters of the Federal Rules have made express provisions for attorney's fees in other instances, for a variety of policy purposes.⁴ See, e.g., Fed. R. Civ. P. Rules 11, 37, 30 and 56. It is axiomatic that had the drafters intended Rule 68 to operate on attorney's fees, they would have said so. An expansion of the meaning of "costs" to include attorney's fees where the drafters have not provided for them would affect many of the rules as well as attorney's fee statutes. This Court should not expand the scope of Rule 68 beyond what was clearly intended by the drafters. Any such expansion would derogate against the scheme of the Federal Rules of Civil Procedure and create attorney's fee shifting absent legislation. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

⁴In those cases the drafters have made clear the purposes and the types of conduct and circumstances giving rises to an attorney's fee sanction.

B. CONGRESS INTENDED THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 AS AN ENHANCEMENT OF A PRIVATE PARTY'S REMEDIES FREE FROM ANY AUTOMATIC OR ABSOLUTE LIMITATIONS.

Congress has mandated fee shifting in 42 U.S.C. Section 1988 and a multitude of other statutes. See *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). This mandate arose in response to the *Alyeska* decision, which expressly required Congress, and not the courts, to authorize fee-shifting. Id.; S.Rep. No. 94-1011 (1976) (reprinted in 1976 U.S. Code Cong. & Admin. News 5908.) In enacting this law, the intent of Congress was crystal clear: "A party seeking to enforce the rights protected by the statutes * * *, if successful, should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)." (footnotes omitted). S.Rep. No. 94-1011 p. 4.

Title 42 U.S.C. Section 1988 states, in part, that "a court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Although Section 1988 provides that fees are to be awarded as part of costs, there is no evidence that Congress intended to expand the scope of Rule 68 by the passage of Section 1988. *Delta Air Lines v. August*, 450 U.S. 346 (1981) (Rehnquist, J., dissenting). Section 1988 defined "attorney's fees" as "costs" for the sole purpose of awarding attorney's fees against state defendants. See S. Rep. No. 94-1011 p. 5 n.6 (citing *Fairmont Creamery v. Minnesota*, 275 U.S. [70] (1927)). This has the practical effect of comporting Section 1988 with the 11th Amendment to the U.S. Constitution. *Hutto*

v. *Finney*, 437 U.S. 678 (1978), and suggests the importance Congress attached to the purposes of Section 1988. "Fee awards are essential if the Federal statutes . . . are to be fully enforced. . . . Fee awards are an integral part of the remedies necessary to obtain compliance." S.Rep. No. 94-1011 p.5. It is clear from such language that the Congress considers Section 1988 imperative for the enforcement of civil rights. See, e.g., *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1976).

This Court has already rejected the mechanical approach that would link up the word "costs" in Rule 68 to the words "fees as part of costs" in Section 1988. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *White v. New Hampshire Dept of Employment Security*, 455 U.S. 445 (1982).

In *Roadway*, the Court noted that "costs" under 28 U.S.C. Section 1927 were generally defined by 28 U.S.C. Section 1920, which enumerated the costs that may be taxed against a losing party. This Court refused to adopt *Roadway's* argument that the language in Section 1988 (fees as a part of costs) should be mechanically linked up with the language in 28 U.S.C. Section 1927 (costs can be taken against . . .). Instead, it traced the general definition of "costs" back to 1796. In *Arcambel v. Wiseman*, 3 Dall. 306, 1 L.Ed. 613 (1796), the Court overturned an award of attorney's fees as against the general practice of the United States. Thus, it recognized the "American Rule" that attorney's fees are usually not among the costs that can be awarded to a winning party. *Roadway* at 760. The Court noted that 28 U.S.C. Section 1927 had as its ancestor an 1853 law which set out costs and fees. 28 U.S.C. Section 1927; Act of Feb. 26, 1853, 10 Stat. 161. The Court refused to adopt a definition of

costs under 42 U.S.C. Section 1988 that went contrary to this long history and held that Section 1988 fees are not part of costs that could be awarded under 28 U.S.C. Section 1927.

"Costs" in the Federal Rules of Civil Procedure, just as in the *Roadway* statute, generally do not include attorney's fees. *Association for Retarded Citizens of North Dakota*, 561 F.Supp. 495 (D.N.D. 1982), aff'd and modified, 713 F.2d 1384 (8th Cir. 1982). Costs and attorney's fees have been schematically kept separate by the drafters of the rules and fees are specifically mentioned whenever the rules govern them. Within this framework, there is no evidence that Congress intended to place Section 1988 attorney's fees into the ambit of costs as found in Rule 68. *Roadway*; *Delta* (Rehnquist, J., dissenting). Without any specific evidence that Congress intended Section 1988 fees to be costs under Rule 68, this Court should be reluctant to extend the meaning and scope of Rule 68. See *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240 (1975).

There are policy problems in construing Section 1988 attorney's fees as costs for Rule 68. Section 1988 was enacted as an important tool for the enforcement of civil rights. S.Rep. No. 94-1011 (1976). Rule 68 was designed to create incentive to settle litigation; Section 1988 was designed to encourage litigation, vindicate rights of constitutional dimension and punish civil rights offenders. S. Rep. No. 94-1011 (1976). Fee awards under Section 1988 are in the discretion of the district courts; Rule 68 is automatic and mandatory. *Id.* Though petitioners claim that there is no conflict in the policies of Rule 68 and Section 1988, we see that those policies do *directly* conflict. If attorney's fees were deemed within

"costs" under Rule 68 the rule would do no more than to punish a successful party who may only have miscalculated the size of the expected recovery. See Note, *The Impact of Proposed Rule 68 On Civil Rights Litigation*, Colum. L. Rev. 719 (1984). An excellent example is the case at bar. Had the jury awarded the respondent \$8,000 more in damages (9 percent), Rule 68 would not be in issue as a bar to attorney's fees. As this Court stated in *Christianberg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978). "No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not appear until discovery or trial [or] the law may change or clarify in the midst of litigation".) If Rule 68 were expanded to include Section 1988 attorney's fees, it would remove the discretion from the district courts and impose sanctions on the civil rights plaintiff without considering the different equities in each factual setting. Given the importance that Congress and this Court have attached to civil rights litigation, this Court should not allow the discretion to award attorney's fees to be pre-empted from the district courts by the simplistic mechanical application of Rule 68. Congress has clearly mandated Section 1988 attorney's fees for civil rights litigation. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 210 (1975). The policy that underlies Rule 68 is valid, but one that would be devastating if applied mechanically and unthinkingly. The district courts already have the power to assess fee sanctions against vexatious parties *Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 litigant. See, e.g., Fed. R. Civ. P., Rule 11; 28 U.S.C. Sec-

tion 1927; see also *Christianberg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978). The district courts do not need the automatic sanctions of Rule 68 to assess or limit attorney's fees when demanded by the circumstances. This Court should hold that Section 1988 attorney's fees are not costs for the purpose of Rule 68.

Construing Rule 68 "costs" to include attorney's fees creates the further problem of placing a simultaneous offer of attorney's fees and substantive relief before the plaintiff. *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020-21 (3d Cir. 1977). While the plaintiff may feel the offer is inadequate, his attorney's experience might show the offer to be of borderline sufficiency. In such a case, Rule 68 encourages an attorney to zealously attempt to deviate from the client's wishes in urging him to settle. The attorney would necessarily fear having to perform months of services, including trial, without fee. Placing the attorney at financial odds with his client at the settlement stage undermines public confidence in the legal profession as well as the individual bond between attorney and client.

Civil rights and other attorney's fee statute cases can be effectively settled without attorney's fees being a part of a Rule 68 offer. The right of recovery of attorney's fees in a civil rights case is ordinarily conferred upon a prevailing party under 42 U.S.C. Section 1988. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); S. Rep. No. 84-1011 (1976). The accepting Rule 68 offeree is deemed such a prevailing party. *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir. 1983). Including in the offer language such as "and attorney's fees accrued to date" would be superfluous if the only purpose were to settle on attorney's fees. The offeree would be

entitled to that amount of attorney's fees in any event. The focus of the offer should appropriately be substantive relief.

A logical result of including attorney's fee in the operation of Rule 68 is the creation of a two-tier system of cost shifting in the federal courts.⁵ *Delta Air Lines v. August*, 450 U.S. 346, 379 (1981). In cases not involving attorney's fee statutes traditional cost-shifting would apply. The risks borne by plaintiff faced with a Rule 68 offer would be easily quantifiable. The penalty of having to pay his own traditional costs for failing to accept a more favorable offer is a penalty that fits the crime.

In cases involving attorney's fee statutes, the offeree would risk the loss of an attorney's fees reimbursement as well. Attorney's fees, unlike traditional costs, have been specifically legislated by statute and remain in the discretion of trial courts. These fees, can vary widely in magnitude depending on a number of factors. See *Hensley v. Eckerhart*, U.S., 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). They are intended to reimburse a prevailing party for his attorney's fee bill. S. Rep. No. 94-1011, p. 2 (1976). If Rule 68 were deemed to apply in attorney's fees statute cases, an offeree could not effectively gauge his risk and the penalty from his failure to accept the more favorable offer could bankrupt him, where he has brought a meritorious claim.

⁵ Indeed, given the number of attorney's fees statutes that contain language similar to that of 42 U.S.C. Section 1988, as well as the great number that allude to costs in other ways, a mandatory operation of Rule 68 against statutes with Section 1988 type wording would create a disparate impact on a multitude of attorney's fees statutes for absolutely no good reason.

Congress promulgated Sec. 1988 in recognition of the need for a vehicle by which private citizens of modest or meager circumstances could sue to enforce their civil rights under the constitution. S.Rep. No. 94-1011 (1976). Through Section 1988 Congress commissioned private attorney generals to represent the aggrieved parties. In doing so, it reinforced and legitimated what otherwise might have been hollow proclamations and guaranteed minimum rights to the citizens of the United States. Rule 68, as petitioners would have it apply, runs afoul of the principles and virtues embodied in Section 1988. Not only would the plaintiff's attorney think very hard when he holds the Rule 68 offer in his hand, but when his fees are barred he would think even harder about representing the next aggrieved party to come his way. As recited in S. Rep. No. 94-1011 at p. 3, in reference to a case brought under the Labor-Management Reporting and Disclosure Act (Landrum Griffin):

"Not to award counsel fees in [these] cases * * * would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall v. Cole*, 412 U.S. 1 (1973), quoting 462 F. 2d 277, 780-81 (2d Cir. 1972)."

II. EVEN IF RULE 68 COSTS WERE HELD TO INCLUDE ATTORNEY'S FEES UNDER SECTION 1988, RULE 68 SHOULD NOT OPERATE TO BAR FEES FOR POST-OFFER WORK IN THIS CASE.

Respondent again urges that the Seventh Circuit opinion holding "costs" as found in Rule 68 of the Federal Rules of Civil Procedure not to include attorney's fee awards under 42 U.S.C. Section 1988 be upheld. However, should this Court determine otherwise, Respondent

urges nonetheless that the offer made in this case was too ambiguously written to hold respondent to its penalty operation. Alternatively, respondent submits that by the proper operation of the rule as applied in this case the offer failed to exceed the judgment finally obtained.

A. THE RULE 68 OFFER MADE IN THIS CASE IS INVALID.

By making an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure, a defendant places an added settlement inducement and burden upon a presumably informed plaintiff. Typically, that inducement takes the form of a threat or penalty through the barring of costs yet to be incurred which otherwise would have been recovered from the defendant after the entry of judgment. That penalty is imposed upon an informed but unwise or miscalculating plaintiff when the damage offer is found later to have exceeded the judgment finally obtained. It is the imposition of this penalty that distinguishes the Rule 68 offer from all other offers. Respondent maintains that for the petitioners to benefit from Rule 68's harsh penalty provisions, it must present to a plaintiff a clear and discrete substantive damage offer so that the plaintiff may heed this special offer and its potential hardships at the time the offer is served. The plaintiff must determine if 1) the offer is sufficient to compensate him for his injury; and 2) if not, whether he must advisedly accept the deficient amount for fear of the consequences of the Rule 68 penalty structure. In this case, respondent received a Rule 68 offer of \$100,000 which included three distinct elements: substantive damages, attorney's fees and costs. While, as noted by

Circuit Judge Posner, the respondent was able to determine his potential "net" recovery, *Chesny v. Marek*, 720 F.2d 474, 478 (1983), he was unable to determine the possible consequences of refusing to accept this offer with any degree of accuracy or confidence. Even assuming that within the ten day offer period his attorney was able to calculate his hours and costs spent to date on the case, there would be no certainty as to what hours or rates a district court would later deem reasonable, if any. *Delta Air Lines v. August*, 450 U.S. 346, 375 (1981) (Powell, J., concurring in the result). Against the backdrop of a case involving an attorney's fee statute, where the fees are lumped together with the substantive relief, it becomes a practical impossibility for both the defendant and plaintiff to know what substantial relief has been offered. The potential for an enhancement factor creates even greater confusion. Whether Rule 68, in view of this offer, will operate as a penalty against attorney's fees is almost as uncertain as a dice throw, regardless of the projected recovery at trial. Compromise is further hampered by the ten (10) day limit for acceptance of the specious offer. Fed. R. Civ. P., Rule 68. With so much confusion created on both sides of bargaining table, the purpose of Rule 68 could not be furthered. Even if respondent were clairvoyant and determined that his judgment finally obtained would be \$60,000, could he have known that the offer exceeded this amount? In the typical case where the offer is properly bifurcated, the answer would be yes. However, in failing to strike a bargain on the offer presented to him in this case, respondent had no opportunity to consider the impact of Rule 68.

In rejecting respondent's challenge to the offer, the Seventh Circuit stated that the open-ended nature of

attorney's fees would in many cases prevent compromise of the case. *Chesny v. Marek*, 720 F.2d 474, 477 (7th Cir. 1983). While this *may* be true, the instant case demonstrates that compromise of fees may still be had even after the substantive relief is determined. And even though compromise cannot be reached in some cases, uncertainty should not be an offeree's cross to bear when attorney's fees are at stake.⁶ The plaintiff's uncertainty is created only when fees are lumped with the substantive relief.⁷ It is the plaintiff who can be severely harmed by the offer and it is the plaintiff's attorney who must advise him of the potential harm.

That the fees may be high in one case versus another is within the policy and control of the relevant attorney's fee statute. Once a defendant offers to take judgment against himself he knowingly submits himself to those fee statutes. Open-ended or not, the prospect of having to pay substantially more in attorney's fees once found guilty at trial is a significant settlement inducement for the putative wrong-doer. The policies of both Rule 68 and Section 1988 can thus be furthered when attorney's fees are properly separated from the substantive award. See *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir. 1983)

⁶ Construing an ancestor provision to Rule 68 a New York Court stated:

The party making the offer [of judgment] frames it to suit himself. If it does not comply with the statute in all substantial respects, it is a nullity, and it may be treated as such by the party served with it. . . . The offer should be specific and certain in all material respects. *Leslie v. Walrath*, 9 N.Y.S.R. 652, 653 (1887)

⁷ A defendant's challenge of an attorney's fee agreement is (as in this case) another factor that may impact on the final award and contribute to the uncertainty of a lump sum offer.

(dicta). On the other hand, the policies of Rule 68 cannot be furthered when neither the offeror nor the offeree can sit at the bargaining table and gauge the special impact of this offer.

This Court can easily lay to rest the confusion surrounding this specious lump sum offer by unequivocally holding that the substantive relief portion of a Rule 68 offer must be stated separately from costs and attorney's fees and that therefore the offer in this case is invalid.

B. THE RELEVANT JUDGMENT FINALLY OBTAINED EXCEEDED THE OFFER MADE IN THIS CASE.

Rule 68 includes a cost shifting mechanism when the judgment finally obtained does not exceed the offer. Petitioners, throughout this case have shown that their understanding of the relevant comparison figure for their offer was \$100,000. *Chesny v. Marek*, 720 F.2d 474, 476 (7th Cir. 1983). That figure included costs and attorney's fees as well as substantive relief. However, petitioners excluded attorney's fees and costs from judgment finally obtained when comparing that figure with the offer. Petitioners stated in their version of the facts that \$60,000 verdict did not exceed the \$100,000 offer. (Pet. Brief at 5). Petitioners have thus compared apples to oranges.

In a case where a lump sum offer includes attorney's fees and costs to date, the judgment finally obtained must necessarily include those items as they accrue through trial. *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579 (D.D.C. 1981); Rubin, *The Award of Attorney's Fees under the Federal Consumer Credit Protection Act*, 99 Banking L. J., 512, 533 n.80 (1982). Cir-

cuit Judge Posner opined that the judgment finally obtained should not include post-offer attorney's fees. He reasoned that the post-offer fees merely offset the costs to the plaintiff of the additional legal work required for trial. *Chesny v. Marek*, 720 F.2d 474, 476 (7th Cir. 1983). But, his reasoning fails insofar as it does not recognize that it is the petitioners who drafted the offer and who chose to have attorney's fees included in the judgment comparison figure by including them in their offer. A defendant should be just as free to make an ill-advised offer as he is to make an effective one. Any other result would give rise to judicial rewriting of his offer.

Accordingly, if this Court is inclined to find that the cost provision of Rule 68 includes Section 1988 attorney's fees, respondent submits that this Court should rule that the offer made in this case is invalid and that the offer failed to exceed the judgment finally obtained pursuant to Rule 68 of the Federal Rules of Civil Procedure.

III. THIS COURT IS NOT THE PROPER FORUM TO DETERMINE THE REASONABLENESS OF ATTORNEY'S FEES IN THE PRESENT ACTION.

A. THIS COURT HAS ALREADY HELD THAT THE REASONABLENESS OF AN ATTORNEY'S FEE AWARD IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

The Seventh Circuit Court of Appeals, in holding that Rule 68 will not operate to bar Section 1988 attorney's fees for post-offer work, remanded this case to the district court to determine the reasonable amount of the fees for post-offer work. *Chesny v. Marek*, 720 F.2d 474, 480 (7th Cir. 1983). The court issued no instructions

to the district court concerning the reasonableness of the fees because the amount of a fee award is in the discretion of the district court. E.g., *Hensley v. Eckerhart*, U.S., 103 S.Ct. 1933, 76 L.Ed. 40 (1983). This Court should not issue additional directions to the district court concerning the reasonableness of attorney's fees for the same reasons. *Id.* In this case, the district court has not entered a judgment concerning the amount of a fee award for post-offer fees. *Chesny v. Marek*, 547 F.Supp. 542 (N.D. Ill. 1982). This Court should properly allow the district court to determine the fee award, based on the merits of the case, pursuant to an evidentiary hearing if necessary.

A prevailing plaintiff in civil rights litigation may ordinarily recover attorney's fees unless special circumstances would render such an award unjust. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); S.Rep. No. 94-1011, p. 4 (1976). The district courts have been given broad discretion in awarding the fees, because the trial judge is in the best position to assess the many factors that must be considered to determine the size (or reasonableness) of a fee award. *Id.*; *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Recently, in *Hensley*, this court has given the district courts an outline to consult when determining the size of attorney's fees in civil right actions. *Hensley v. Eckerhart*, U.S., 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). This outline will aid the district court in determining the issue of attorney's fees in the present case in a fashion that is equitable to both parties. Any additional, broadly constructed directions based solely on the merits of this case would remove the discretion from the district court and do injustice to the parties.

B. PETITIONERS HAVE NONETHELESS WAIVED THE ISSUE BY FAILING TO PROPERLY RAISE IT IN THE SEVENTH CIRCUIT.

The respondent, as prevailing party, is entitled to fees based on the reasonable value of his attorney's services in *Hensley v. Eckerhart*, U.S., 103 S.Ct. 1933, 765 L.Ed. 2d 40 (1983). The issue of a reasonable fee in the present case was never litigated in the district court. Although Judge Shadur stated that the petitioners were entitled to a hearing on the issue, the parties opted to compromise on a figure for pre-offer fees and costs. The petitioners later failed to raise the issue of a reasonable fee on appeal (J.A. 26). The petitioners claimed that he had no knowledge of the respondent's fee arrangement with his attorney until oral argument in the Seventh Circuit. (Pet. Brief at 37) This claim is directly contradicted by the district court's memorandum opinion of September 3, 1982 which clearly stated the court's recognition that the attorney's fee was contingent on the outcome of the litigation as well as a grant of section 1988 fees. (J.A. 25) Since the issue was not litigated in the district court, and not raised on appeal, the issue is not properly before this court. See *Blum v. Stenson*, U.S., 104 S.Ct. 1541, 1545 n.5, 79 L.Ed. 2d 891, 897, n.5 (1984). Finally, there is no proper fee request pending in the district court. (J.A. at 24). Considering the district court's discretion in setting reasonable attorney's fees in light of *Hensley*, the petitioner's failure to litigate or appeal the issue, and the absence of a proper fee request currently pending in the district court, this Court should not hear the issue of reasonableness of fees regardless of the respondent's contract with his attorney.

C. RESPONDENT'S AGREEMENT WITH HIS ATTORNEY DOES NOT CREATE A WINDFALL AS A MATTER OF LAW OR FACT.

The existence of a contingent fee contract does not alter the fact that the fee award is in the discretion of the district court. It is just another factor that must be taken into account in determining the size of the fee award. See *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The contingent fee contract will not (and should not) operate to bar statutory fee awards under 42 U.S.C. Section 1988. *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983); *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982); see also, Note, *Attorney's Fees in Damage Actions under the Civil Rights Attorney's Fees Award Act of 1976*, 47 U.Chi.L.Rev. 332 (1980).

The agreement in the present case is notably different from the ordinary "run of the mill" contingent fee agreement. The usual contingent fee agreement would allocate a percentage of the substantive damage award plus all of the Section 1988 fees recovered to the attorney. Alternatives have included a reimbursement of the damage portion of the award when Section 1988 fees are available. The choice is to be made by the parties. The agreement in the present action divides *all* recovery, *both* the substantive damage award *and* the Section 1988 fee award, between the respondent and his attorney. The respondent receives 55 percent of everything recovered while the attorney receives 45 percent. (J.A. 51). Had the respondent lost the action, his attorney would have received no compensation for his effort on behalf of his client. This result can in no sense be characterized as giving the respondent's attorney a windfall profit. Had the contract provided that the attorney would recover

solely Section 1988 fees and the client solely the damage award, respondent's attorney would have been much better off than under the present contract. In this case, the attorney's fees for the entire trial litigation approximated \$171,000; damages were \$60,000. A standard agreement would give \$60,000 (the damages) to the client and \$171,000 (attorney's fees) to the attorney. The contract in *this* case would give the client \$127,000 (55% of the damage award and 55% of the Section 1988 fee award) and the attorney no more than \$104,000 (45% of the recovery). Respondent's attorney is much worse off than were he to have the more popular arrangement with his client. An agreement that gives the attorney 33 percent of the substantive damage award *plus* all of section 1988 fees would have given the respondent \$39,600 (66% of the damage award) and his attorney \$199,000 (33% of the damage award and 100% of the Section 1988 fee award). Although this type of arrangement, as do many others, has the potential to give an attorney a windfall profit, there is no danger of windfall in the present case. Of the three types of agreements discussed above, the agreement in this case gives the respondent's attorney the least and the respondent the most.

Inasmuch as respondent recognizes that an attorney should recover a fee based on the reasonable value of his service as outlined in *Hensley v. Eckerhart*, U.S., 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983), the above discussion is offered to illustrate that the existence of a fee agreement is but one factor for the district court to take into account in deciding the amount of a fee award, and not a complete bar to Section 1988 fees. 42 U.S.C. Section 1988 (1982). Accordingly, this Court should allow the district court to determine the reasonableness of respondent's Sec-

tion 1988 fee request in its discretion and consistent with the guidelines of *Hensley*.

CONCLUSION

The respondent respectfully requests that the judgment of the Court of Appeals For The Seventh Circuit be affirmed and the case remanded to the district court for a determination of a reasonable award of attorney's fees to respondent pursuant to 42 U.S.C. Section 1988 for services performed by his attorney after the offer of judgment.

Respectfully submitted,

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12
No. 83-1437

In the
Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNEY, Individually and as Adminis-
trator of the Estate of STEVEN CHESNY, deceased,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES
UNION AND THE ROGER BALDWIN FOUNDATION
OF THE AMERICAN CIVIL LIBERTIES UNION AS
AMICUS CURIAE SUPPORTING RESPONDENTS**

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QUESTIONS PRESENTED

1. Whether Rule 68 can be construed in a way which cuts off a civil rights plaintiff's right to § 1988 attorneys fees and imposes liability on such a plaintiff for defendant's fees regardless of the reasonableness of the offer of judgment at the time it was made or the productiveness of the post-offer work of plaintiff's counsel?

2. Whether an offer of judgment which lumps together plaintiff's damages and plaintiff's § 1988 attorneys fees is a valid offer under Rule 68?

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INTEREST OF AMICI*

This case raises the question of whether Federal Rule of Civil Procedure 68 may be applied in a manner which deprives a prevailing civil rights plaintiff of his attorneys fees and make him liable for the attorneys fees of a losing defendant. It also raises the question of whether a Rule 68 offer of judgment may lump together plaintiff's damages and attorneys fees.

The American Civil Liberties Union ("ACLU") and the Roger Baldwin Foundation of the ACLU ("ACLU Illinois") frequently represent civil rights litigants. Indeed, such representation is, in some ways, the central purpose of both organizations. Moreover, the receipt of fee

* The parties have consented to the filing of this amicus brief. Their written consents have been filed with the Clerk of Court under Rule 36.2 of the Rules of this Court.

awards in successful lawsuits of this type is an important source of funding for both organizations. The construction of Rule 68 proposed by petitioner, in addition to being contrary to the plain meaning of that Rule, would make vigorous enforcement of the civil rights laws by organizations like amici virtually impossible, for it would give civil rights defendants a settlement weapon of such potency as to permit the virtual dictation of settlement terms.

As to the second question raised by this case, whether an offer of judgment combining fees and damages is proper, the course of conduct pursued by this petitioner would, if endorsed by this Court and generally pursued by civil rights defendants, create grave ethical problems for amici and, indeed, for all civil rights attorneys. The problem arises from the fact that § 1988 attorneys

fees are not determinate in amount, but, instead, are normally fixed by the trial judge in a complex balancing process which may raise the fee above or drop it below the attorney's normal hourly rate. Given the inherent uncertainty of this process, an attorney who is asked to evaluate a Rule 68 offer which lumps damages and fees will have a strong incentive to overvalue the fee component of the offer, where his client's interest would favor predominance of the damages component. The procedure followed by these petitioners guarantees that such conflicts will be faced by the ACLU and the ACLU of Illinois in numerous future cases.

Accordingly, for all of the foregoing reasons, the ACLU and the ACLU submit the following brief in support of respondent.

SUMMARY OF ARGUMENT

Petitioners urge this Court to construe Rule 68's use of the term "costs" as including attorneys fees in those cases covered by the provisions of 42 U.S.C. § 1988. This proposed construction is based on the happenstance that § 1988 provides that prevailing civil rights litigants will receive their reasonable fees "as part of costs". Petitioners' position, however, is inconsistent with the plain meaning of Rule 68 and it threatens to gut the effectiveness of § 1988. Additionally, the offer of judgment employed in this case -- an offer which lumped together plaintiff's damages and his fees -- was so indefinite as to be improper for Rule 68 purposes and, in addition, it had the potential to create severe ethical problems for plaintiff-respondent's counsel

I.A. For almost two hundred years since its decision in Arcambel v. Wiseman, 3 Dall. 306, 1 L.Ed. 613 (1796), this Court has recognized the sharp distinction drawn in the American system between "costs" on the one hand, and attorneys fees on the other. As a result, this Court has consistently construed statutory use of the term "costs" without any further specification to exclude attorneys fees. This distinction between fees and costs is particularly evident and well articulated in the Federal Rules of Civil Procedure. Where the Rules intend to refer to both costs and fees, they do so. E.g., Rules 11, 37. In contrast, where the Rules refer to "costs" simpliciter, they are normally construed as referring to costs exclusive of fees.

Of special significance in this regard is the construction given Rule 54(d). Rule 54(d) provides that a pre-

vailing party will be allowed his or her costs "as of course," a result which Rule 68 was specifically intended to alter when the prevailing party has rejected, and failed to better, an offer of judgment. The framers' understanding of the use of the term "costs" in Rule 54(d), as evidenced by the Notes of the Advisory Committee and the authorities referred to therein, clearly distinguished between Rule 54(d) costs and attorneys fees. This distinction has been preserved in contemporary procedure under the Rule, as is evidenced by the numerous decisions which distinguish between the procedures for assessing Rule 54(d) costs and those for assessing attorneys fees. The distinction between Rule 54(d) costs and § 1988 attorneys fees is further etched with particular clarity by the presumption that costs go to the prevailing party-- regardless of whether that be plaintiff

or defendant--as a matter of course. Section 1988 fees are not routinely shifted in this way, and it is well established that a prevailing civil rights defendant must establish that plaintiff's suit was "clearly frivolous, vexatious or brought for harassment" before he may recover fees from a defeated plaintiff. Hughes v. Rowe, 449 U.S. 5, 14-16 (1980). Thus, Rule 54(d) "costs" cannot be construed as including fees if the rule is to be read harmoniously with Hughes and § 1988.

B. The mere fact that § 1988 states that fees will be assessed in favor of a prevailing party "as part of costs" does not alter the plain meaning of the term as it is used in Rule 68. The "as part of costs" formula was used by Congress for purposes that have nothing to do with the policy of settlement served by Rule 68. Because the same is true of other statutes which award attorneys

fees and characterize them as "part of costs," the construction of Rule 68 urged by petitioners would result in a crazy quilt scheme of fee shifting, and judicial application of the Rule in this manner would comprise precisely the sort of "standardless judicial rulemaking" eschewed by this Court in Roadway Express v. Piper, 447 U.S. 752, 761-762 (1980).

II. In addition to being contrary to its plain meaning, the construction of Rule 68 urged by petitioners would create an insupportable conflict between that Rule and § 1988. The conflict is not required by the policies underlying Rule 68, and it poses serious separation of powers problems.

A. Section 1988 was enacted in order to "ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensely v. Eckerhart, ____ U.S. ____, 103 S.Ct.

1933, 1937 (1983). A construction of Rule 68 which would include § 1988 fees would be wholly contrary to this purpose. Because the Rule applies mechanically -- that is, regardless of whether the rejection of the offer was justified and regardless of whether counsel's post-offer work was productive -- counsel will be forced to risk their compensation on his ability to foresee and accurately predict all of the numerous contingencies that affect any litigation. This problem will be particularly acute where the offer of judgment comes at an early stage in the case, before any serious discovery. Additionally, the fact that Rule 68 makes a plaintiff potentially liable for his opponent's post-offer costs means that civil rights plaintiffs will on petitioners' theory, be exposed to potentially ruinous fee liability for failing to guess right. When faced with any offer of judgment

that has even the remotest possibility of accurately predicting the outcome at trial, civil rights plaintiffs will be virtually compelled to capitulate, and § 1988 will effectively be transformed from a key to the courthouse to a lock barring entry.

B. This result is not demanded by the policy favoring settlement. Prevailing civil rights plaintiffs are only entitled to their "reasonable" attorneys fees. Thus, presumably, an unreasonable rejection of an offer of judgment which results in little or no productive post-offer work will be a factor considered by a court reviewing a fee petition. This case, however, offers no insight into the significance of such considerations. Here, there has never been any assessment as to the reasonableness of plaintiff's conduct. Thus, for all any-

one knows, plaintiff's rejection of the offer of judgment was perfectly justified and the effort that went into the case after the offer was productive. Accordingly, there is no reason to believe that the policy favoring settlement demands that this plaintiff be denied his post-offer fees.

C. Given this intense and unnecessary conflict between the proposed construction of Rule 68 and the policies underlying § 1988, separation of powers doctrine dictates that Rule 68 be construed in a manner which harmonizes its provisions with Congress' considered decision to implement its policy judgments in the form of § 1988. This Court's authority to formulate rules of practice is derived either from its inherent powers or from the Rules Enabling Act. It is well established that this Court will not exercise its inherent powers in a manner which

upsets Congress' considered decisions in the attorneys fees area. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Similarly, the power delegated to this Court under the Rules Enabling Act must be exercised in a manner "consistent" with Congress' statutes 28 U.S.C. 2071. Accordingly, since the construction of Rule 68 urged by petitioners would put that Rule in conflict with § 1988, that construction must be rejected.

III. In addition to the shortcomings of petitioners' proposed construction of the term "costs," the Court of Appeals should be affirmed for the reason that the offer of judgment made in this case was not proper

A. In order to be valid, a Rule 68 offer of judgment must be sufficiently

determinate to permit the offeree-plaintiff to meaningfully evaluate the likelihood that he will better the offer by pursuing the case to judgment. Where, as here, an offer of judgment combines attorneys fees and damages in one lump sum, the plaintiff will only be able to evaluate to the offer to the extent that he can specify the size of the fee component and thereby determine his net recovery. Section 1988 fees, however, are so indeterminate as to preclude such analysis. Such fees are not fixed by counsel's hourly rate, but are determined on the basis of a complex 12 factor balancing process which is left to the discretion of the trial court and which may result in an award that is above or below the hourly figure. Given this indeterminacy, an offer of judgment which lumps

fees and damages is not suitable for Rule 68 purposes.

B. Moreover, such an offer raises serious ethical problems. Because the plaintiff will look to his attorney to evaluate such an offer of judgment, and because the attorney will always have a strong pecuniary interest in maximizing the fee component of an offer of this sort, tender of such an offer always runs the risk that a conflict of interest will arise. This is not to say that such conflicts are inevitable, and it is not to say that ethical counsel will never be able to resolve them, but it is to say that the risk of insoluble conflicts and less than resolute counsel is inevitable, and that a construction of Rule 68 which invites such ethical dilemmas should be avoided if at all possible.

ARGUMENT

A RULE 68 OFFER OF JUDGMENT CANNOT DESTROY THE RIGHT OF A PREVAILING CIVIL RIGHTS PLAINTIFF TO RECOVER HIS OR HER ATTORNEYS FEES UNDER THE PROVISIONS OF 42 U.S.C. §1988.

Section 1988 of Title 42 entitles prevailing civil rights plaintiffs to recover their "reasonable" attorneys fees. Petitioners herein have argued that this statutory right can be negated by a defendant's shrewd use of the cost-shifting provisions of Federal Rule of Civil Procedure 68. This argument is at odds with the plain meaning of the term "costs" as it is used in Rule 68 and as it has been used by this court for close to two centuries. Further, the construction of Rule 68 proposed by petitioner would unconstitutionally seek to apply this Court's rulemaking authority in a manner which would eviscerate the carefully considered Congressional policy decisions embodied in 42 U.S.C. §1988

without materially enhancing the policies served by Rule 68. Finally, the argument proposes a procedural strategem which introduces such ambiguity into Rule 68 offers as to make them unsuitable to the purposes of the Rule and, in many circumstances, one which creates insuperable ethical problems for plaintiffs' counsel.

I. The Plain Meaning of the Term "Costs" in Rule 68 Precludes Application of that Rule To Shift the Parties' Responsibilities for Attorneys Fees.

Rule 68 provides that a plaintiff who fails to better defendant's formal offer of judgment by carrying a case through to judgment will not be entitled to all of the "costs" normally awarded to "prevailing parties" under Rule 54(d), and, further, that, such a plaintiff will be obligated to pay the post-offer costs incurred by the defendant-offeror. It is petitioner's position that a fortuity of the drafting of § 1988 -- the decision to characterize a fee award

as "part of the costs" -- had the effect of expanding Rule 68's cost-shifting scheme to include the shifting of fees in civil rights cases. This conclusion is inconsistent with Rule 68's plain meaning.

A. The Plain, Longstanding, and Well Litigated Meaning of "Costs" in the American System Does Not Include Attorneys Fees.

Since at least 1796 it has been the consistent view of this Court that "attorneys fees ordinarily are not among the costs that a winning party may recover." Roadway Express v. Piper, 447 U.S. 752, 759, (1980); relying on Arcambel v. Wiseman, 3 Dall. 306, 1 L.Ed. 613 (1796). Accordingly, this Court has normally had little trouble in recognizing that, whatever else the term "costs" may include, it does not, absent an express statutory provision to the contrary, include attorneys fees. This Court has

specifically so held with respect to the unmodified use of the term in the Lanham Act, 15 U.S.C. §1117, Fleischman Distilling Corporation v. Maier Brewing Co., 386 U.S. 714, (1967), and with respect to its similarly unadorned use in Section 1927 of Title 28, Roadway, at 447 U.S. 757-763.

Against this background, the plain meaning of Rule 68's "cost" shifting provisions is that they apply only to "costs" as that term has been understood for close to two centuries; that is, to costs exclusive of fees. Certainly other provisions of the Federal Rules of Civil Procedure support this conclusion. Thus, where the Rules intend to include attorneys fees among costs or expenses, they specifically so state. E.g., Rules 11, 37(a)(4), 37(b) ("reasonable expenses, including attorneys fees").

In contrast, where the term "costs" is used without any such amplifying language, it has generally been construed as not including fees. Most significantly, this is the case with Rule 54(d), the very provision whose cost allocation formula -- "costs shall be allowed as of course to the prevailing party" -- is altered by the application of Rule 68. Thus, the 1938 Advisory Committee which drafted Rule 54 was quite explicit that it intended for the Rule to be read harmoniously with, inter alia, former section 830 (currently section 1920) of Title 28, F.R.Civ.P. 54(d), Notes of Advisory Committee, a statute which, as this court has recently noted, defines "costs" as not including attorneys fees, Roadway, supra. Moreover, one of the authorities cited by the 1938 Advisory Committee as descriptive of "the present rule [governing costs] in

common law actions," see F.R.Civ.P. 54(d), Advisory Committee Notes, specifically recognized that, "In the federal courts, the practice is based upon the fundamental, essential, and common law doctrines and distinctions as to costs and fees." Payne, Costs in Common Law Actions in the Federal Courts, 21 Va. L.Rev. 397, at 381-398, 404-405, (1935) (emphasis in original). This "contemporaneous understanding" of the cost-fee distinction is, of course, strong evidence that the unmodified use of the term "costs" by Rule 54's drafters was advised, and was not intended to include fees. Delta Air Lines, Inc. v. August, 450 U.S. 346, 377 (1981) (Rhenquist, J., dissenting).

Moreover, several courts have gone so far as to specifically hold that § 1988 attorneys fees are not the sort of "costs" taxable under Rule 54(d), and have, as a result, sharply distinguished

between the procedural rules applicable to fee petitions on the one hand and bills of cost on the other. Thus, for example, several courts have held that fee petitions are not subject to local rule time limits governing the filing of bills of costs. See, e.g., Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982); Brown v. Palmetto, 681 F.2d 1325 (11th Cir. 1982); Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982); cf. Seyler v. Seyler, 678 F.2d 29 (5th Cir. 1982) (an application for appellate fees is not subject to the 14-day time limit in Rule 39 of the Fed. R. App. P. applicable to appellate costs).^{*} Similarly, it is

^{*} In fact, this Court has apparently endorsed this distinction with its observation that "district courts remain free to adopt local rules establishing

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well established that, when it exists, a party's right to attorneys fees is a right to something above and beyond Rule 54 "costs" which is independently actionable and, thus, not dependent Rule 54's provision for the taxation of "costs."

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939).

Indeed, this distinction between Rule 54(d) "costs" and § 1988 "fees" is compelled by § 1988's legislative history and by this Court's decisions as

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claims for attorney's fees." White v. New Hampshire Department of Employment Security, 455 U.S. 445, 454 (1982) (footnote omitted). See also, e.g., Baird v. Bellotti, 724 F.2d 1032, 1037 & n.6 (1st Cir. 1984); Metcalf v. Borba, 681 F.2d 1183, 1187-88 (9th Cir. 1982); White v. New Hampshire Department of Employment Security, 679 F.2d 283, 285 (1st Cir. 1982); Obin v. District No. 9, Int'l Association of Machinists, 651 F.2d 574, 583 (8th Cir. 1981); Knighton v Watkins, 616 F.2d 795, 798 n.2 (5th Cir. 1980).

to the statute's operation. The contrary rule -- treating fees as an item of Rule 54(d) costs in civil rights actions -- would make fees taxable "as a matter of course" not only on the part of prevailing plaintiffs, but also on the part of prevailing civil rights defendants. Such a result was manifestly not intended by Congress, which was careful to explain that § 1988 fees would not "ordinarily" be awarded to prevailing defendants, and that a civil rights plaintiff "could be assessed with his opponent's fees only where it is shown that his suit was clearly frivolous, vexatious or brought for harassment purposes." S. Rep. No. 1011, 94th Cong. 2d. Sess. 5 (1976) Reprinted in 1976 U.S. Code Cong. & Ad. News, 5012. Since this standard was squarely endorsed by this Court in Hughes v. Rowe, 449 U.S. 5, 14-16 (1980), see also Christiansberg

Garment Co. v. EEOC, 434 U.S. 412 (1978) (Title VII attorneys fees), a reading of Rule 54(d) which includes fees among Rule 54 "costs" is foreclosed.* Because there is nothing to indicate that Rule 68 "costs" were intended to be different from Rule 54 "costs." Rule 68 should be read consistently with Rule 54, and its terms should not be construed in a manner which shifts responsibility for § 1988 attorneys fees.

* Indeed, the courts of appeals have uniformly held that losing civil rights plaintiffs whose lawsuits were not frivolous, unreasonable or without foundation, cannot be held liable for the winners' fees though they are presumptively liable for the winners' Rule 54(d) costs. See, e.g., Wrighten v. Metropolitan Hospitals, 726 F.2d 1346 (9th Cir. 1984); Cross v. General Motors Corp., 721 F.2d 1152 (8th Cir. 1983); Moore v. Hughes Helicopters, Inc., 708 F.2d 492 (9th Cir. 1983); Poe v. John Deere Co., 695 F.2d 1103 (8th Cir. 1982); P. Mastrippolito and Sons, Inc. v. Joseph, 692 F.2d 1384 (3d Cir. 1982); Delta Air Lines, Inc. v. Colbert, 692 F.2d 489 (7th Cir. 1982); Montgomery v. Yellow Freight System, Inc., 671 F.2d 412 (10th Cir. 1982);

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Notwithstanding the two hundred years of precedent distinguishing between costs and fees, petitioners and amicus, the Solicitor General, argue that the plain meaning of the term "costs" was altered by Congress' enactment of the Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988. As the Solicitor General's Brief acknowledges, however, the inference that a statutory provision works an "'abrogation' of a [Federal] [R]ule [of Civil Procedure] is 'inappropriate' absent a 'clear expression of Congressional intent.'" Amicus Br. at 28, paraphrasing

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Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981); Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981); see also, Gilchrist v. Bolger, 733 F.2d 1551 (11th Cir. 1984); Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983); cf. Baez v. United States Department of Justice, 684 F.2d 999 (D.C. Cir. 1982) (en banc) (same rule as to appellate costs under Rule 39 of the Fed. R. App. P.).

In re General Motors Engine Interchange
Litigation, 594 F.2d 1106, 1134-1135

n.50 (7th Cir. 1979), cert. denied, 444
U.S. 870 (1980). Section 1988 contains
no "clear expression of [Congressional]
intent" sufficient to "abrogate" the
plain meaning of Rule 68.

B. The Plain Meaning of Rule 68
was not Abrogated by the
Statutory Formula Employed
in § 1988.

The argument that Rule 68 costs
include § 1988 attorneys fees rests on
the happenstance characterization of
such fees as "part of the costs" to be
awarded a prevailing party in a civil
rights action. No legislative history
has been cited -- and none exists -- to
suggest that this particular statutory
formula was intended to have the effect
urged. Indeed, the only effect intended
by Congress through its use of the "part
of the costs" formula was to give § 1988

the broadest possible application by circumventing potential Eleventh Amendment problems in civil rights claims brought against the states. As the Fifth Circuit has concluded, "the legislative history makes clear that this was done for one reason and one reason only: to ensure that the Eleventh Amendment is no bar so that these fees are recoverable against Government officials acting in their official capacity." Gates v. Collier, 616 F.2d 1268, 1276 (5th Cir. 1980), modified on other grounds on rehearing, 636 F.2d 942 (5th Cir. 1981). See, also, S. Rep. No. 1011, 94th Cong., 2d Sess. 5 n.6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 n.14 (1976); see generally Hutto v. Finney, 437 U.S. 678 (1978). Thus, it is not surprising that, as the Solicitor General candidly admits, he does "not contend that Congress chose this

language specifically envisioning its effect in conjunction with Rule 68."

Amicus Br., at 9-10.

But if Rule 68, in the absence of the § 1988 formula, has a clear and unambiguous meaning which does not include attorneys fees, then it is impossible to see how the inadvertant interplay between the statute and the rule evidences the "clear expression of Congressional intent" which is required to "abrogate" that meaning.* Indeed, there are strong reasons for doubting that any such intent -- clear or otherwise -- is inferable.

* Petitioners also argue that "costs," as the term was used by the drafters of Rule 68, was intended to include fees because, at the time of its formulation, there were numerous statutes which authorized attorneys fees "as part of costs." The argument, apparently, is that because "costs" as used in Rule 68 was not given an express definition at any point in the Federal Rules, it therefore has no independent meaning at all, functioning instead as a kind of placeholder whose

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Section 1988 was enacted to encourage the prosecution of meritorious civil rights claims and, as such, it is "acutely sensitive to the merits of an action and to antidiscrimination policy."

Roadway, 447 U.S. at 762, 100 S.Ct. 2455.

The use of the "parts of costs" formula was merely intended to further this end.

Hutto, supra. In contrast, Rule 68 was

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whose value changes depending on the cause of action being litigated. For the reasons already given, the notion that there was, in 1938, some sort of ambiguity as to whether or not "costs," absent express statutory provision to the contrary, included fees is absurd. The fact that Congress, as of 1938, had enacted numerous pieces of legislation in which the definition of "costs" had been expressly expanded, shows, if anything, that Congress was quite aware of the difference between costs and fees and that it was careful to state that "costs" included fees when that is what it meant. Thus, the background of attorneys fees statutes which colors Rule 68 suggests that Rule 68 costs include traditional costs and nothing else. If Congress had meant to expand the scope of the term, it would have done so explicitly as it had on so many other occasions.

not enacted for this purpose, but solely in order to foster settlement of disputes. Delta Air Lines v. August, 450 U.S. 346, 352 (1980). The notion that Congress intended to expand the scope of a rule intended to serve one purpose when it was drafting statutory language intended to serve a wholly different purpose is dubious at best. Indeed, carried to its logical conclusion, the argument presented to this court would "result in virtually random application of [Rule 68] on the basis of other laws that do not address the problem" of fostering the settlement of disputes. Roadway, 447 U.S. at 761-762. This Court has resoundingly rejected such invitations to "standardless judicial rulemaking" in previous fee cases. Id. It should do so again here.

The "random" and "standardless" character of petitioners' approach is evident from the appendix attached to

the Solicitor General's Brief. There it is revealed that, if Rule 68 "costs" are permitted to include fees on the basis of the underlying statutory formulae, fees will be shifted under the Rule in most civil rights cases, but not in fair housing litigation. 42 U.S.C. § 3612(c) (costs listed separately from fees).

Similarly, fees will shift under Rule 68 in actions involving stock manipulation and false securities filings, 15 U.S.C. 78i(e), 78r(a), ("costs (including attorneys fees)"), but not in actions arising from other material misrepresentations made in connection with securities transactions. Or, again, Rule 68 will apply to fees in Magnuson-Moss warranty actions, 15 U.S.C. § 2310(d), but not in diversity actions brought under the warranty provisions of the Uniform Commercial Code. It is impossible to infer any deliberate decision as to the proper scope of Rule 68 from such a crazy quilt of fee-shifting.

In short, the plain meaning of "costs" as that term is used in Rule 68 precludes an application of the Rule to cut off a successful civil rights plaintiff's right to attorneys fees. Section 1988's characterization of such fees as "part of costs" does not constitute the sort of "clear" Congressional intent that is required to alter Rule 68's plain meaning.

II. The Construction of Rule 68 Urged by Petitioner Would Raise Serious Constitutional Questions about the Separation of Powers by Eviscerating § 1988 without Materially Enhancing the Policy Served by Rule 68.

In addition to being contrary to its plain meaning, the construction of Rule 68 urged by petitioner puts that Rule squarely in conflict with the policy determinations embodied by Congress in § 1988. For reasons set forth above, this conflict between statute and rule is not required by the plain language of either. Neither is it required by the

policy underlying Rule 68, since thoughtful judicial application of Section 1988 will suffice to assure that its fee award provisions do not insulate plaintiffs from the need to be realistic participants in the settlement process. In the absence of any compelling need to read Rule 68 in a way which conflicts with § 1988, this Court's authority to do so must be viewed as highly suspect under traditional separation of powers doctrine. Accordingly, for this reason as well, the construction of Rule 68 urged by petitioners cannot be accepted.

A. The Construction of Rule 68 Urged by Petitioners Would Eviscerate § 1988.

The policy underlying § 1988 is no mystery. It is, "to ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensley v. Eckerhart, ____ U.S. ____,

103 S.Ct. 1933, 1937 (1983). In consequence, the presumption is that a successful civil rights plaintiff will "ordinarily" be entitled to recover reasonable fees, and this presumption will only be overcome under "special circumstances." Hensley, supra, quoting S.Rep. No. 1011, at 4(1976), 1976 U.S. Code Cong. & Ad. News 1976, 5912. Moreover, because the primary focus of the statute is plaintiff's ability to gain access to the courts, prevailing defendants receive § 1988 fees only if plaintiff's suit was "frivolous, unreasonable, or without foundation." Hughes, 449 U.S. at 14-16, see also Christiansburg Garment, 434 U.S. 412, (1978). The proposed construction of Rule 68 undermines this statutory scheme by seriously diminishing the incentives that Congress created for the purpose of attracting competent counsel to the civil rights area, and it devastates

that scheme by grotesquely expanding the circumstances under which civil rights defendants will be able to levy personally against plaintiffs to recover their fees.

Rule 68 cuts off a prevailing party's right to costs -- and, under petitioner's theory, fees -- not only where an offer of judgment is unreasonably rejected, but in any situation where the offer turns out to be better than the ultimate recovery:

It deprives a district court of its traditional discretion under Rule 54 to disallow costs to the prevailing party in the strongest verb of its type known to the English language -- "must".

Delta, 450 U.S. at 369. Thus, it makes no difference to the Rule's application if, between the date of the offer and the date of judgment, the law has changed, new and unexpected facts have come to light, a crucial witness changes his or her testimony, there is a change of coun-

sel, there is a change of judge, a jury behaves quixotically or any one of the million and one other things which can and do affect the course of a lawsuit occur. Regardless of the reasonableness of the offer at the time, the Rule is unbending in its application.

But compensation under § 1988 must be at a level "adequate to attract competent counsel," Hensley, 103 S.Ct. at 1938 n.4; S.Rep. No. 1011, at 6. The mechanical application of Rule 68 mandated by its language would surely "cut across the grain" of this goal if, as petitioners urge, Rule 68 "costs" are deemed to include fees. Under this arrangement, any counsel faced with a Rule 68 offer is immediately put in the insufferable situation of staking his compensation for any post-offer work on the hope that his projections about the events likely to take place throughout the life of a law-

suit turn out to be correct. Moreover, where the offer comes at an early point in the litigation and before any significant discovery, these projections are, at best, partially informed. Under such circumstances, the attorney is either forced to gamble his wage on the hope that the sealed book of defendant's records and witnesses -- a book fully known to the defendant-offeror -- will back up the attorney's preliminary findings, or the attorney is forced to advise his client to surrender a potentially valuable claim because of the attorney's fear that he will not recover fees sufficient to justify its vigorous prosecution.

This glum picture becomes even bleaker when the proposed construction of Rule 68 is examined from the perspective of the plaintiff himself. Rule 68 provides not only that the offeree loses his right to recover post-offer costs

when settlement is improvidently rejected, but also that "the offeree must pay the costs incurred after the making of the offer." The courts that have considered the question have unswervingly held that, as this language plainly implies, a plaintiff who rejects but does not better an offer of judgment is saddled with responsibility not only for his own costs, but for defendant's as well. Liberty Mutual Insurance Co. v. EEOC, 691 F.2d 438, 442 (9th Cir. 1982); Dual v. Cleland, 79 F.R.D. 696 (D.D.C. 1978); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D. N.Y. 1974). If, as petitioner urges, Rule 68 "costs" include attorney's fees in civil rights cases, the potential liability for a civil rights plaintiff of modest means in a lawsuit of any complexity may well be ruinous. See Delta, 450 U.S. at 378 (Rehnquist,

J., dissenting)* Under such circumstances, most plaintiffs would be effectively powerless to reject even grossly undervalued offers of judgment, giving civil rights defendants virtual carte blanche to dictate the terms on which

* The Solicitor General argues, Amicus Br., at 8 n.3, that, because the Delta decision mandates that Rule 68 only comes into play when plaintiff actually receives a judgment in an amount less than the offer, a defendant-offeror will never be a "prevailing party" under § 1988 and, thus, never entitled to receive fees under that statute. The same argument, however, would suggest that Rule 68 does not entitle defendants to post-offer costs, as Rule 54(d) awards costs only to "prevailing parties." The authorities cited in the text above establish that this is not the case. Indeed, the whole point of Rule 68 is to shift the burdens and entitlements between prevailing and non-prevailing parties during the post-offer period and what is at issue here is precisely whether the post-offer cost shifting effected by the Rule includes the parties' responsibilities with respect to § 1988 fees. Amicus cannot have it both ways. Either Rule 68 shifts fees or it does not. There is no basis in the Rule's language and its judicial gloss for arguing that an offeree can be denied his post-offer costs without simultaneously assuming responsibility for the offeror's costs.

such lawsuits are resolved. The proposed construction of Rule 68 would, thus, effectively transform § 1988 from a key which opens the courtroom door to a lock which bars entry.

B. The Rule Urged by Petitioners
Will not Materially Enhance
the Policies Served by Rule 68.

Petitioners and the Solicitor General argue that, whatever the potential disincentives to vigorous prosecution of the civil rights laws created by their proposed construction of Rule 68, this construction is required to serve the end of fostering settlement in these matters, and, in any event, that "Section 1988 is not an unqualified, single-minded provision intended to override any policies that stand in its way." Amicus Br., at 15. Thus, much is made of the fact that, in this case, the post-offer fees of plaintiff's counsel ex-

ceeded \$100,000. Amicus Br., at 17. This argument, however, ignores the fact that a plaintiff is not automatically entitled to recover all of the fees requested by his attorney. Indeed, this plaintiff's attorney in this case has not yet become entitled to any post-offer fees because the trial judge has not yet ruled on any such request. Rather, like any other prevailing party, plaintiff here will only recover post-offer fees to the extent that the trial court finds them "reasonable."

It is well established that one of the "important" considerations examined by a court in determining a "reasonable" § 1988 fee is "the result obtained." Hensley, 103 S.Ct. at 1940. Consistent with this standard, where a plaintiff unreasonably rejects a settlement offer incurring considerable expense to no productive end, it is only to be

expected that the court which determines plaintiff's fee award will take any unproductive recalcitrance into account.

This case, however, offers no insight as to the relevancy of such considerations to a fee determination. No record exists at this point to indicate that plaintiff's rejection of the offer was in the least unreasonable or that his counsel's post-offer work was all unproductive.

What is clear is that application of Rule 68 to the facts of this case -- whatever they may turn out to be -- is precisely the wrong way to factor such considerations into a fee determination. Petitioners are, essentially, recommending that Rule 68 be construed as creating a sort of per se standard for determining whether or not plaintiff's post-offer fees are "reasonable." Such ironclad rules have never been applied

in § 1988 decisions. Instead the standard has always been that, "the amount of the fee . . . must be determined on the facts of each case," Hensley, 103 S.Ct. 1937, and Congress has repeatedly and specifically declined to jettison this flexible attitude towards evaluation of a plaintiff's settlement posture for the mechanical fee shifting urged by Petitioners.*

Such repeated Congressional refusals to act are normally given great weight in construing a statute's meaning.

* The first bill seeking to impose a mechanical application of § 1988 in connection with rejected settlement offers was introduced by Senator Orrin Hatch as S. 585, 97th Cong., 1st Sess. (1981). That bill provided in § 2(c) that:

No fee shall be awarded under [§ 1988] as compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the
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E.g., Bob Jones University v. United States, ____ U.S. ____, 103 S.Ct. 2017, 2032-2034 (1983). Here, particularly when taken in conjunction with all of the other indices of Congressional intent discussed above, Congress' continuing refusal to alter § 1988 in the manner proposed by petitioners strongly suggests that the policies favoring settlement do not mandate the rule of law proposed.

In short, Petitioner's construction of Rule 68 is anathema to the congressionally determined policies em-

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relief ultimately awarded by the court.

Two sets of hearings were held on S. 585. Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982); Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 585 Before the Subcomm. on the Constitution of the Se-

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nate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981). The legislation was never voted out of subcommittee.

Early in the next Congress, Senator Hatch introduced S. 141, 98th Cong., 1st Sess. (1983). That bill, contained provision identical to § 2(c) of S.585. Although hearings on S. 141 have been repeatedly scheduled and postponed, none have actually been held. The legislation has not been voted out of subcommittee.

In June, 1984, Senator Strom Thurmond introduced S. 2802, 98th Cong., 2d Sess. (1984); see generally Cong. Rec. S8842-55 (daily ed. June 29, 1984) (statement of Sen. Hatch). An identical bill was introduced in the House by Representative Hamilton Fish, H.R. 5757, 98th Cong., 2d Sess. (1984). This legislation, titled the "Legal Fees Equity Act," is directed at not only § 1988 but every federal fee-shifting statute that authorizes fee recovery against federal, state or local governments or their officials. Section 8(2) of the legislation provides that:

Sec. 8. No award of attorney's fees and related expenses subject to the provisions of this Act may be

made --

(Continued on next page)

bodied in the Attorneys Fee Awards Act, and it is not required by the general policy favoring settlement. Because the construction imposed would create a conflict between a court created rule

(Continued from previous page)

(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that --

(A) the relief finally obtained by the party is not more favorable to the party than the offer of settlement, and

(B) the failure of the party to accept the offer of settlement was not reasonable at the time such failure occurred.

Senate hearings were held on September 11, 1984. Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984). Like the Hatch proposals, this legislation has not been voted out of subcommittee.

and a congressionally enacted statute, traditional separation of powers concerns dictate that the conflict should be resolved in favor of the Congress' considered decision.

C. The Rule Proposed by Petitioners Raises Serious Separation of Power Problems.

This Court's authority to formulate rules governing attorneys fees has two potential sources: its "inherent" powers, see Roadway, 447 U.S. at 764-767, and the powers delegated to it under the Rules Enabling Act. 28 U.S.C. § 2071-2072. Since this Court's decision in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975), it has been clear that the long history of congressional activity in this area establishes that the decision of when to award attorneys fees to a prevailing party is "a policy matter that Congress has reserved for itself." 421 U.S. at 269. Accordingly, bowing to the most

fundamental of separation of power doctrines, this Court there declined "to invade the legislature's province by redistributing litigation costs." 421 U.S. at 271. Because § 1988 was enacted by Congress as a direct response to the Alyeska decision, S. Rep. No. 1011, at 4, the very logic of that opinion bars an exercise of this Court's inherent powers to construe Rule 68 in a manner which devastates the intended effect of that statute.

Nor is the proposed construction of Rule 68 a proper exercise of the power delegated under The Rules Enabling Act. The rulemaking authority delegated by the Rules Enabling Act is limited.* It

* Indeed, in light of this Court's ruling in Chadha v. INS, ____ U.S. ____, 103 S.Ct. 2764 (1983), there is reason to doubt that mere Congressional inaction during the "laying over" period mandated by § 2072 is sufficient to vest any rule with any greater authority than the rule would enjoy by reason of this Court's inherent powers.

specifically subordinates this Court's rulemaking authority to Congress' considered policy decisions, requiring, in its first section, that rules formulated by the courts, "shall be consistent with Acts of Congress . . ." 42 U.S.C. § 2071. This limitation is echoed and underlined by the requirement, imposed in the Act's second section that, "Such rules shall not abridge, enlarge or modify any substantive right . . ." 42 U.S.C. § 2072. As the Solicitor General's Brief makes clear, this latter provision is most properly construed as referring "to the allocation of authority between Congress and the Court." Amicus Br., at 25.

Here, far from being "consistent" with § 1988, the construction of Rule 68 commended by petitioners would overstep the "allocation of authority between Congress and the Court" set out in Alyeska, by upsetting the carefully considered

policy balance effected by § 1988. Accordingly, in construing Rule 68, separation of powers doctrine requires that, to the extent the two are in conflict, Rule 68 must be subordinated to § 1988. A fortiori, this means that petitioners' construction of Rule 68 must be rejected.

III. An Offer of Judgment which Includes both Plaintiff's Damages and Plaintiff's § 1988 Attorneys Fees is not Proper for the Purposes of Rule 68.

Even if the plain language of Rule 68 and the strong policies underlying § 1988 did not require it, there is a third reason why the ruling of the Court of Appeals must be affirmed in this case: the offer of judgment made by petitioner was not a valid or proper one under Rule 68. The offer of judgment made in this case included in one lump sum the amount that was to be paid plaintiff to compensate him for his injury, his costs, and his attorneys fees to the

date of the offer. Such an offer of judgment is improper first, because it is so uncertain as to be useless for Rule 68 purposes; and, second, because this same uncertainty creates a conflict of interest between the offeree and his lawyer.

- A. An Offer of Judgment which Includes \$ 1988 Attorneys Fees is too Uncertain to be Valid Under Rule 68 Purposes.

An Offer of Judgment, in order to be valid under Rule 68, must specify a determinate recovery to be realized by the offeree-plaintiff. The general practice has been capsulized by a leading commentator:

"To be within Rule 68, the offer of judgment must be unconditional. Thus an offer which is subject to the provisions of an instrument which can only be determined by judicial action is not such an offer. Nor is an offer that does not include money damages prayed, but only consents to the plaintiff having the equitable relief demanded, such an offer. The offer must be specific as to the sum to be entered as judgment, and an offer which fails to specify a definite sum

which can be either accepted or rejected will not preclude a court's consideration of the offeree's costs thereafter incurred."

Moore's Federal Practice, ¶68.04, at 68-9 (citations ommitted).

The basis for this requirement is obvious: absent a concrete offer which the plaintiff "can accept or reject" it is impossible for the plaintiff to make a knowing evaluation of the likelihood that the offer can be bettered by trying the case on its merits. Accordingly, the significance of the "inducement" to settlement created by the offer, see, Delta, 450 U.S. at 352, will be impossible to assess. Where, as here, the offer of judgment includes \$ 1988 attorneys fees in one lump sum with the amount to be paid to the plaintiff personally, the plaintiff cannot meaningfully evaluate the worth of the offer.

Plaintiff's net recovery from an offer lumping fees and damages will

be the total amount of the offer less his attorney's "reasonable" § 1988 fees. Thus, his ability to assess the offer turns on his ability to assess his attorney's "reasonable" § 1988 fees. Any such estimation, however, is inherently so uncertain as to be meaningless.

As this Court has recently noted, § 1988 fees are awarded on the basis of 12 interrelated factors, Hensley, 103 S.Ct. at 1937 n.3, whose evaluation "may lead the district court to adjust the [total hourly] fee upward or downward." Id., at 1940. This delicate calculation is largely discretionary with the district court, id., at 1941, which, "is not bound by the prevailing party's attorney's proposed hourly rate or by the bill submitted. The fee itself must be reasonable." Delta, 450 U.S. at 365 (Powell, J., concurring). As a consequence, "neither the plaintiff nor

the defendant can know with any degree of certainty how much of the attorney's fees a prevailing plaintiff seeks will be allowed by a trial court exercising its discretion..." Id., 450 U.S. at 379 n.5, (Rehnquist, J., dissenting).

In short, when faced with an offer like the one here at issue, a plaintiff is required to bear not only the burden of the normal Rule 68 offeree -- that he forecast as to the likely outcome of the lawsuit -- but also the burden that he prognosticate as to the value of the very settlement proposed to him. A Rule 68 offer entailing such double speculation is identical to an offer whose terms "are subject to the provisions of an instrument which can only be determined by judicial action." Moore, supra. As in that situation, the value of this offer turns on a highly discretionary and unpredictable judicial determination.

Because the plaintiff has no idea of the value to him personally of the proposed judgment, such offers are meaningless as a basis for settlement, and therefore improper under Rule 68. Moore, supra.

Notwithstanding this problem, it has been contended that the double speculation that faces such an offeree is equally a problem for the offeror, and that the objective of a Rule 68 offer of judgment is to give the defendant-offeror an opportunity to fix his total exposure for both damages and fees. Absent an opportunity to simultaneously fix both sums, it is argued, defendants will be unwilling to employ Rule 68 to settle the damages aspect of a civil rights claim, for this will only mean that they will still be faced with potentially "open-ended" liability for fees. See Delta, supra.

The policy underlying Rule 68 -- encouraging the settlement of lawsuits -- does not, however, require this result. If it is in fact the case that defendants make offers of judgment -- or, for that matter, settlement offers of any sort -- in order to avoid the risk that a trial on the merits will expose them to excessive liability for damages and fees, it is equally the case that plaintiffs accept offers of judgment to avoid the converse risk that a trial on the merits will not improve their net recovery. But if the incentive for both parties entering into the settlement process is the elimination of risk and uncertainty, the fact that this type of Rule 68 offer decreases defendant's uncertainty while simultaneously increasing plaintiff's means that the overall incen-

tives for both parties to settle have not changed.* Thus, the policy considerations underlying Rule 68 do not require that defendants be permitted to make offers of judgment lumping \$ 1988 fees with damages and costs. Since the uncertainty inherent in such an offer makes it unworkable for Rule 68 purposes, it is invalid.

* In the same vein, it should be recognized that a plaintiff is in no better a position to eliminate the uncertainty as to what level of fees the court will find "reasonable" than is defendant. While it is true that the plaintiff will know the amount of time his attorney has spent on the case and his attorney's normal hourly rate, defendant will normally be fully aware of the customary rate for comparable legal work in the community and he will have his own attorney's time as an index of the number of hours "reasonably" required to handle the case. Neither plaintiff nor defendant, of course, will be any better off in predicting how the court is likely to exercise its discretion in adding to or subtracting from the "lodestar" rate times hours figure.

B. An Offer of Judgment which Includes Attorneys Fees is Unethical and Creates a Conflict of Interest Between Plaintiff and his Lawyer.

While there will undoubtedly be exceptions, normally an offer of judgment which includes attorneys fees and damages in one lump sum, places plaintiff's lawyer in an insoluble conflict of interest. In order to advise his client intelligently whether to accept the offer, the lawyer will be required both to assess the likely result of a trial on the merits and to assess the likely disposition of his petition for "reasonable" § 1988 attorneys fees. As a practical matter, however, the real party in interest with respect to § 1988 fees is the attorney, see, e.g., Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978), who will, therefore, have a strong pecuniary interest in maximizing his estimate of the fees to which he is "reasonably" entitled.

But when he is advising a client about the value of a Rule 68 offer which includes both fees and damages, every dollar that the attorney allocates to his fee claim is a dollar subtracted from the plaintiff's net recovery. Thus, inevitably, there is a direct conflict between counsel's and client's interest in counsel's advice on this point.* An offer of judgment which creates such a conflict cannot be proper.

Indeed, fear of precisely this conflict has led numerous courts to dis-

* It is this conflict which distinguishes cases where the attorney's contingent fee is determined as a matter of judicial discretion from the classic contingent fee situation discussed by the court below, where the attorney's fee is determined by contract as a fixed percentage of plaintiff's recovery. Under the fixed percentage arrangement, the attorney's "slice of the pie" is established by mutual agreement between attorney and client. In the Rule 68/§ 1988 situation, in contrast, the danger is that the allocation between attorney and client will be determined by the attorney's self interested advice.

approve other settlement arrangements which lump together fees and damages. Prandini v. National Tea Company, 557 F.2d 1015 (3d Cir. 1977); Lisa v. Snider, 561 F.Supp. 724 (N.D. Ind. 1983); See also Mendoza v. United States, 623 F.2d 1338, 1353 (9th Cir. 1980); Obin v. District No. 9, supra, 651 F.2d at 582; Benitz v. Collazo, 571 F.Supp. 246, 250 (D.P.R. 1983); Jones v. Orange Housing Authority, 559 F.Supp. 1379 (D.N.J. 1983); 80 F.R.D. 665 (D.Ariz. 1978); Regalado, supra. Accord: Delta, supra, 450 U.S. at 364, 101 S.Ct. at 1156 (Powell, J., concurring). Cf., Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of The New York City Bar Association, 36 Record of N.Y.C.B.A. 507 (1981) (Holding that it is a breach of professional ethics for defendant to condition settlement on the merits on full or partial waiver of statutory attorneys fees). See also,

Manual for Complex Litigation, reprinted
in 1, Pt. 2, Moore's Federal Practice,
1.46, at 74 ("When counsel for the class
negotiates simultaneously for the settle-
ment fund and for individual counsel
fees there is an inherent conflict of
interest."). Where a Rule 68 defendant
does not know the nature of the fee
arrangement between plaintiff and his
counsel, an offer of judgment which com-
bines these items inherently runs the
risk of creating the very conflict which
had so unequivocally and so consistently
been disapproved by these courts.*

* Since petitioners acknowledge that
they first learned the terms of the con-
tingent fee arrangement in this case on
appeal, Petitioner's Brief, at 37, the
fact that this fee agreement happened to
be drafted in a way which circumvented
this conflict does not eliminate the
risk run by Petitioners at the time they
made their offer. Certainly it does not
eliminate that risk from future Rule 68
cases; nor does it eliminate the certainty
that, in a certain percentage of such
cases, this risk will be realized.

This does not, of course, mean that such offers will inevitably result in conflicts of interest. Nor, as this Court has noted, does it necessarily mean that counsel will never be able to cope with those conflicts which do arise. White, 102 S.Ct. at 1167 n.15. What it does mean is that the risk of such conflicts is inevitable under Petitioners' proposed rule, as is the risk that counsel will be unable or unwilling to ameliorate the conflicts which do come to pass. Surely a rule which positively invites and encourages unethical behavior is not one to be willingly embraced so long as some alternative exists. For all of the reasons previously discussed, an alternative does exist to the construction of Rule 68 urged by petitioners. That alternative should be adopted.

CONCLUSION

For all of the foregoing reasons,
amici ACLU and ACLU of Illinois respectfully request that this Court affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI,
and LAWRENCE RHODE,
Petitioners,

v.

ALFRED W. CHESNY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Rule 68 requires that a prevailing party in a civil rights action brought under 42 U.S.C. § 1983 be denied attorneys' fees for time expended on the case after rejecting a settlement offer more favorable than the amount subsequently recovered after trial.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

 No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI,
 and LAWRENCE RHODE,
 v. *Petitioners,*

ALFRED W. CHESNY,
Respondent.

 On Writ of Certiorari to the United States Court of Appeals
 for the Seventh Circuit

**BRIEF OF THE LAWYERS' COMMITTEE FOR
 CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE
 IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE¹

The Lawyers' Committee for Civil Rights Under Law (the "Committee") was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to protect the civil rights of all Americans. The Committee has had the assistance of well over a thousand members of the private bar in numerous cases that have addressed the problems of minorities and the poor. As a frequent liti-

¹ Letters from counsel for the parties consenting to the submission of this brief have been filed with the Clerk.

gant in cases brought under 42 U.S.C. § 1983 and other remedial statutes which contain fee-shifting provisions, the Committee will be directly affected by the decision in this case.

The issue presented here is whether "costs" under Fed. R. Civ. P. 68 ("Rule 68") include attorneys' fees where the statute under which the case is brought provides that a prevailing plaintiff may receive attorneys' fees. Such fee-shifting statutes exist because, in each substantive area to which they apply, Congress has determined that the public interest is served by awarding attorneys' fees to successful litigants. The Committee has had first-hand experience with such fee-shifting provisions, and with the kinds of settlement offers likely to be made in civil rights cases. The Committee believes that the interpretation of Rule 68 urged by petitioners would have a direct and harmful effect on civil rights plaintiffs and other plaintiffs who serve as "private attorneys general" and thus help to advance national policy. The Committee files this brief in support of respondent urging affirmation of the judgment below.

STATEMENT

Respondent Alfred W. Chesny filed suit in 1979 under 42 U.S.C. § 1983 against petitioners, police officers of the Village of Berkley, Illinois, seeking damages because of petitioners' allegedly unlawful shooting of his son. On November 5, 1981, petitioners made an offer of judgment under Rule 68 "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND (\$100,000) DOLLARS." Joint Appendix at A-17. The respondent refused the offer and the case proceeded to trial. On May 11, 1982, the jury returned a verdict in favor of respondent in the amount of \$60,000. Respondent then moved under the Civil Rights Attorney's

Fees Awards Act of 1976 ("Fees Awards Act"), 42 U.S.C. § 1988, for a fee award.²

The district court held that Rule 68 limited respondent's fee award to the time and effort expended prior to petitioners' offer of judgment. Rule 68 provides that if a plaintiff receives less after trial than the defendant's offer of judgment, then plaintiff "must pay the costs incurred after the making of the offer." The district court interpreted "costs" under Rule 68 to include attorneys' fees where the statute under which the action was brought authorizes an award of attorneys' fees, as part of the costs, to a prevailing party.

The Seventh Circuit, in an opinion by Judge Posner, reversed on the ground that Rule 68 cannot be interpreted to defeat Congress' policy to award fees to prevailing plaintiffs where those plaintiffs acted as private attorneys general. It emphasized that civil rights plaintiffs

should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at the trial if they win, merely because on the eve of trial they turned down what turned out to be a more favorable settlement offer.

Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983).

The Seventh Circuit found that although Rule 68 was clearly intended to encourage settlements, and thus to conserve the resources of both the parties and the courts, it could not have been intended to alter substantive con-

² The United States has emphasized in its amicus brief that substantial attorneys' fees were generated in this case. See e.g., Brief of United States at 3. The size of the fee requested by respondent after trial is irrelevant to this Court's determination of the issues before it. Nothing in the record, however, suggests that the fees requested were excessive or inconsistent with the work required to bring the case to trial.

gressional policies, such as those underlying the Fees Awards Act. The Rules Enabling Act, 28 U.S.C. § 2072, provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right." Accordingly, the court held that Rule 68 must be interpreted consistently with the substantive policies of the Fees Awards Act.

SUMMARY OF ARGUMENT

Petitioners' interpretation of Rule 68 would significantly enlarge the role and effect of settlement offers to the serious detriment of civil rights plaintiffs. Any claim that "costs" under Rule 68 include attorneys' fees contravenes basic rules of statutory construction and legal precedent, and critically undermines federal legislation enacted to protect fundamental national policies.

Rule 68 provides that a party may be held responsible for "costs" under specified circumstances. "Costs" are not defined in the Federal Rules, although seven Rules provide for their award. The courts have consistently interpreted "costs" as used in the Rules to include those costs set out in 28 U.S.C. § 1920 and generally awarded to the prevailing party under the "American rule," which does not permit the award of attorneys' fees. Those Federal Rules which permit courts to award attorneys' fees as a sanction characterize such fees as "expenses," not "costs." "Costs" should be defined consistently in all the Federal Rules which authorize their award.

Petitioners would interpret costs under Rule 68 differently depending on whether the statute under which the action is brought provides for an award of attorneys' fees to a prevailing plaintiff. Petitioners argue that if such an award is authorized by statute, the "costs" which become the responsibility of the prevailing plaintiff under Rule 68 include such fees. Under this view, the goals Congress sought to achieve with fee-shifting would be negated by Rule 68 whenever a defendant makes an offer

of judgment which proves greater than the sum awarded plaintiff after trial.

The definition of "costs" under Rule 68 should not expand or contract depending on the statutory basis for suit. Instead, fee shifting is appropriate where authorized by a substantive statute, even if Rule 68 may otherwise cut off the plaintiff's reimbursement for costs. Any other conclusion would be contrary to Congress' intention in providing for fee-shifting in civil rights cases, and would have a seriously chilling effect on plaintiffs seeking injunctive or other nonmonetary relief. Any interpretation of Rule 68 that greatly increases the risks of litigation to such plaintiffs provides defendants in civil rights cases with a new and effective weapon to frustrate meritorious actions in a manner never intended by Congress.

ARGUMENT

I. THE "COSTS" SPECIFIED IN RULE 68 DO NOT INCLUDE ATTORNEYS' FEES

The term "costs" as used in the Federal Rules of Civil Procedure should be given its common meaning, and should be interpreted consistently throughout the Rules. Nowhere in the Rules are "costs" defined to include attorneys' fees within the taxable costs of litigation.³ Rule 68 uses the term "costs" in the same way as other Rules which permit costs to be taxed to one party or an-

³ The current Rules which provide for the award of costs under certain circumstances are Rule 41(d) (Costs of Previously Dismissed Action); Rule 54(d) (Judgments; Costs); Rule 55(b)(1) (Judgment by Default); Rule 65(c) (Security); Rule 68 (Costs); and Rule 71A(l) (Costs in Condemnation Actions), which quotes a Justice Department manual for use in condemnation suits to the effect that "normal expenses," including the fees of counsel appointed to represent absent defendants so that quiet title may be transferred, are to be charged to the government directly but "not taxed as costs." Rule 76(c) (Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs) also provides for award of costs.

other upon the occurrence of a particular event. "[T]he plain language of Rule 68," *Delta Airlines v. August*, 450 U.S. 346, 351 (1981), mandates that "costs" be interpreted in Rule 68 consistently with the other Federal Rules.

Whenever attorneys' fees are mentioned in the Rules they are included as a sanction which may be invoked to punish noncompliance with a particular rule. Attorneys' fees are uniformly described within the Rules as an element of expenses.⁴ This treatment of attorneys' fees is consistent with the characterization of attorneys' fees in the Federal Rules of Appellate Procedure, and with the American rule that the costs to be awarded to a prevailing party do not include attorneys' fees.⁵

Moreover, such a construction is consistent with this Court's recent analyses of the interplay between Rules 54(d) and 68. Under Rule 54(d), a prevailing plaintiff "presumptively" will obtain costs. *Delta Airlines*, 450 U.S. at 352. The "costs" to be taxed under Rule 54(d) do not include attorneys' fees, which become payable by a losing defendant only pursuant to applicable statute. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975).⁶ The Court's mandate in *Delta Airlines* that

⁴ The current Federal Rules which provide for the award of "expenses . . . , including a reasonable attorney's fee," are Rules 11; 16(f); 26(g); 30(g); 37(a)(4), (b)(2), (c), (d) and (g); and 56(g).

⁵ The Federal Rules of Appellate Procedure allow award of attorneys' fees under Rule 38, "Damages for Delay." The Advisory Committee Notes to that Rule state that "damages, attorney's fees, and other expenses incurred by an appellee" may be awarded if an appeal is found to be frivolous.

⁶ While Rule 54(d) makes liability for costs "a normal incident of defeat," *Delta Airlines*, 450 U.S. at 352, it also provides that courts may otherwise direct, and that exceptions to the Rule exist where "express provision therefor is made either in a statute of the United States or in these rules." The flexibility of Rule 54(d) is not found in Rule 68. Rule 68 makes no provision for the exercise of

the Federal Rules be interpreted consistently with one another clearly requires that the taxable "costs" under Rule 68, as under Rule 54(d) and other Rules, exclude attorneys' fees.

Both Congress and the courts have treated attorneys' fees differently from other costs and expenses of litigation. Just as doctors' fees are a major component of the cost of medical care, so attorneys' fees are a large part of the costs of litigation.⁷ Nonetheless, the general (or "American") rule is that each litigant ordinarily must bear its own attorneys' fees unless there is express statutory authorization to the contrary. The American rule, which is contrary to the preexisting common law policy, was intended to equalize the burden of litigation, making it more likely that litigants without deep pockets would be able to assert their rights in court. With narrowly defined exceptions,⁸ this Court has made clear that Congress alone has the authority to create and define the situations in which a reallocation of attorneys' fees serves a public purpose. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 260, 262 (1975).

Costs are in an altogether different category than attorneys' fees. This Court recognized as early as 1851 that "the legal taxed costs are far below the real expenses incurred by the litigant." *Day v. Woodworth*, 54

discretion by the court, nor does it indicate that the "costs" which may be reallocated to encourage settlement should be interpreted differently depending on the statute involved.

⁷ See, e.g., Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 Colum. L. Rev. 719, 720 (1984) (attorneys' fees are "by far the largest expense of litigation"); and Comment, *Taxation of Costs in Federal Courts—A Proposal*, 25 Am. U.L. Rev. 877, 881 (1976) (attorneys' fees "are often the single, largest expense of litigation").

⁸ The principal exceptions involve bad faith and the existence of "common funds." See Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 349 (1980).

U.S. (13 How.) 363, 372 (1851). "Costs" that were awarded to the successful litigant did not include attorneys' fees. As the Court held, it was not the American practice "to indemnify the plaintiff for counsel-fees and other real or supposed *expenses over and above taxed costs.*" *Id.* at 371-72 (emphasis added). See also *Sioux County v. National Surety Co.*, 276 U.S. 238 (1928), where this Court held that an attorney's fee award authorized by state statute was not the same as "costs in the ordinary sense of the traditional arbitrary and small fees . . . allowed to counsel. . . ." *Id.* at 243.

The federal courts have consistently interpreted "costs" under Rule 68, as under the other Federal Rules, to refer to taxable costs as those costs are defined in 28 U.S.C. § 1920. See *White v. New Hampshire Department of Employment*, 629 F.2d 697, 702-03 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982); *Greenwood v. Stevenson*, 88 F.R.D. 225, 231-32 (D.R.I. 1980). See also *Pigeaud v. McLaren*, 699 F.2d 401, 403 (7th Cir. 1983); Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 Colum. L. Rev. 719, 721 n.9 (1984). Section 1920 was enacted to standardize the treatment of costs in federal litigation, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759-61 (1980), and constitutes the "modern version" of the 1853 Fee Act, 10 Stat. 161, whose "explicit purpose . . . was to limit the award of costs to specific itemized expenses related to the mechanics of bringing a case before the courts." *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1189 n.12 (11th Cir. 1983). In *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 655 (7th Cir. 1981), the court referred to Section 1920 as the standard by which to assess costs on a Rule 54(d) motion since that Rule, like Rule 68, does not define costs. Thus, the "rule implicitly embodies the American rule, whereby parties ordinarily cannot recover attorneys' fees as costs." *Id.* at 655 (citation omitted).⁹

⁹ The following articles, published almost contemporaneously with the enactment of the Federal Rules in 1938, illustrate the

As the Court stated in *Alyeska*, Congress has not "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." 421 U.S. at 260 (footnote omitted). Those limitations are now contained in Section 1920. By not amending that provision to encompass attorneys' fees, Congress has implicitly confirmed that, as a general rule, taxable costs are those delineated in Section 1920. Where Congress has deemed it appropriate to provide attorneys' fees, it has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Id.* (citation omitted).

Similarly, this Court has referred to attorneys' fees that may be awarded under the Federal Rules as part of expenses, not costs. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court noted that it was within the power of an equity court to award attorneys' fees "against a party who shows bad faith" and that the use of such Federal Rules as 37(a)(4) and 56(g) for this purpose "vindicates judicial authority without resort to the more drastic sanctions available . . . and makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 689 n.14 (emphasis added).

Finally, it is significant that the Advisory Committee of the Judicial Conference of the United States has consistently characterized attorneys' fees as expenses, not costs. The Committee's 1983 proposal to revise Rule 68 to encourage settlements would have provided for the shifting of costs "*and expenses, including any reasonable attorneys' fees.*" *Preliminary Draft of Proposed Amend-*

applicability of the American rule that attorneys' fees are not costs to be shifted from one party to another unless a statute so provides. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619 (1931); Payne, *Costs in Common Law Actions in the Federal Courts*, 21 Va. L. Rev. 397 (1935); Note, *Distribution of Legal Expenses Among Litigants*, 49 Yale L.J. 699 (1940); Note, *Costs—Problems in the Allowance of Attorneys' Fees in America*, 21 Va. L. Rev. 920 (1935).

ments, 98 F.R.D. 337, 362, 365 (1983) (emphasis added).¹⁰ Both the original draft and a recent revision provide expressly for awards of attorneys' fees under Rule 68 so that settlements will be encouraged. The Committee's draft amendments would define attorneys' fees as part of expenses, consistently with the long-standing interpretation of the rest of the Rules.

II. CONGRESS DID NOT INTEND FEE-SHIFTING STATUTES TO EXPAND THE DEFINITION OF "COSTS" IN RULE 68

Both petitioners and the United States argue that Congress must have known in 1938, when the Federal Rules were adopted, that costs under Rule 68 would include attorneys' fees because Congress had already provided that in some circumstances attorneys' fees could be reallocated as part of the costs of an action. This argument is untenable. In none of the fee-shifting statutes that predate the Federal Rules did Congress provide simply for the shifting of "costs" without clearly stating that those costs—unlike taxable costs—included attorneys' fees.

The pre-1938 statutes that provided for fee-shifting served a variety of public purposes¹¹ and did not use

¹⁰ The draft was subsequently withdrawn and replaced by a more recent revision. The current draft, now under consideration by the Advisory Committee, proposes that costs and expenses, including reasonable attorneys' fees, be shifted as a sanction that may be imposed by the court "as a means of facilitating the efficient operation of the litigative process." The Rules cited by the Committee's comments as applying the same principle are those Rules that specifically refer to attorneys' fees: Rule 37(b)(2), (c) and (d); Rules 11 and 26(g); Rule 56(g); Rule 30(g); and Rule 41(a)(2). Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* 12-19 (1984).

¹¹ The Interstate Commerce Act, (the "Act"), c. 104, § 8; 24 Stat. 379, 382 (1887), (cited by the government in its brief in the Act's codified version as 49 U.S.C. § 11705(d)(3) and as post-1938) contains an early example of fee-shifting to encourage private enforcement of safety standards for the public bene-

identical language, or provide for uniform fee shifting if the plaintiff prevailed. Formulations, and the amount of discretion the courts were given in determining whether to award *any* attorneys' fees, varied with each statute. For example, the Packers and Stockyards Act of 1921, 7 U.S.C. § 210(f), states that "[i]f the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit." The Clayton Act, 15 U.S.C. § 15(a), provides that prevailing plaintiffs "shall recover . . . the cost of suit, including a reasonable attorney's fee." The Securities Act of 1933, 15 U.S.C. § 77k(e), provides that the court may "require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees" and that if the court believes the suit or defense to have been without merit, the prevailing party may receive costs "in an amount sufficient to reimburse him for the reasonable expenses incurred by him." These and other statutes cited by petitioners and the United States¹² suggest only that attorneys' fees were considered part of "the cost of suit" to be shifted when Congress elected to do so to achieve certain goals. These statutes do not, however, indicate any congressional intention to define

fit. The Act provided that "such common carrier shall be liable to the person . . . injured thereby for the full amount of damages . . . together with a reasonable counsel or attorney's fee." Similarly, under Section 40 of the Copyright Act of 1909, 35 Stat. 1084, now codified at 17 U.S.C. § 505, the court in its discretion "may award" such attorneys' fees to a prevailing party "as part of the costs." Congress intended there to compensate the prevailing party for expenses to encourage active protection of copyright, since the value of the copyright, and hence any damage recovery, is difficult to measure. See Note, *Distribution of Legal Expenses Among Litigants*, 49 Yale L.J. 699, 707 (1940).

¹² The Norris-LaGuardia Act, 29 U.S.C. 107(e), cited by the United States, provides that before a temporary restraining order may be issued, the party which has requested it must provide an undertaking, the amount of which will be fixed by the court, sufficient to cover "all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order."

"costs" under the Federal Rules to include attorneys' fees.

If Rule 68 is interpreted as it was by the district court, and as now urged by petitioners, the definition of "costs" for the purpose of Rule 68 would vary with the statutory basis of the underlying action. It is anomalous to define "costs" under Rule 68, but not the other Federal Rules,¹³ differently depending on (1) whether the prevailing plaintiff would otherwise be entitled to attorneys' fees under the statute;¹⁴ (2) if so, whether that statute permitted the award of costs, "including" attorneys' fees, or instead, costs "and" attorneys' fees, in which case Rule 68 would not apply under petitioners' argument since fees are not described as *part of* costs;¹⁵ (3) whether the fee award statute provides for a mandatory or discretionary award of fees;¹⁶ and (4) whether the statute authorizes attorneys' fees to the prevailing party, either plaintiff or

¹³ The Advisory Committee's 1938 notes to Rule 54(d), which provided then as now for a shifting of costs, cited an article by Payne, *Costs in Common Law Actions in the Federal Courts*, 21 Va. L. Rev. 397 (1935) for an explanation of "the present rule in common law actions." The article indicates that attorneys' fees were not considered part of the costs to be awarded.

¹⁴ For example, see 49 U.S.C. § 11705(d) (3) (mandatory award of attorneys' fees against carrier in violation of Interstate Commerce Act).

¹⁵ Compare, for example, the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) ("[T]he court may . . . assess reasonable costs, including reasonable attorneys' fees . . ."), with 28 U.S.C. § 1927 ("[A]ny attorney . . . [engaged in vexatious litigation] may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred. . .").

¹⁶ Compare the Clayton Act, 15 U.S.C. § 15(a) ("[A]ny person who shall be injured . . . shall recover . . . the costs of suit, including a reasonable attorney's fee"), with 17 U.S.C. § 505 ("the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs").

defendant.¹⁷ Rule 68 should not be interpreted in this varying and essentially haphazard way. Nor should it be interpreted to disadvantage prevailing plaintiffs in civil rights litigation who have not accepted an offer of judgment. There is no logical way, given a definition of costs that varies with the cause of action, to ensure that costs—enormously increased to include the losing defendant's attorney's fee—would not be shifted to the prevailing plaintiff in a civil rights action.¹⁸ In contrast, prevailing plaintiffs to whom Rule 68 is equally applicable but who are *not* eligible for fee-shifting would have the benefit of the common interpretation of costs. Thus, they would be required, at most, to pay costs as those costs are usually defined.

¹⁷ See, for example, 17 U.S.C. § 505, cited above, and the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(a) ("[T]he court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs").

¹⁸ As Justice Rehnquist explained in *Delta Airlines*, 450 U.S. at 378,

To construe Rule 68 to allow attorney's fees to be recoverable as costs would create a two-tier system of cost-shifting under Rule 68. Plaintiffs in cases brought under those statutes which award attorneys' fees as costs and who are later confronted with a Rule 68 offer would find themselves in a much different and more difficult position than those plaintiffs who bring action under statutes which do not have attorneys' fees provisions. No persuasive justification can be offered as to how such a reading of Rule 68 would in any way further the intent of the Rule which is to encourage settlement.

It is true that the district court in this case did not require the plaintiff to pay the attorneys' fees incurred by the *defendants* after rejection of the settlement offer and that petitioners do not seek that result here. Nevertheless, we believe that it will be difficult to limit the effect of the approach urged by petitioners. Once the mechanical operation of Rule 68 is permitted to defeat the congressional policy of awarding fees to prevailing plaintiffs in Section 1983 suits, every defendant in a civil rights case can be expected to argue that the "pro-settlement" objectives of Rule 68 should be maximized by including defendants', as well as plaintiffs', fees in the "costs incurred" after rejection of a settlement offer.

Adoption of petitioners' construction of Rule 68 would defeat the careful congressional policies embodied in the fee-shifting statutes. Congress has historically used fee-shifting to encourage private citizens to enforce certain statutes and to vindicate national policies. Fee-shifting encourages private citizens to use their statutory rights to obtain redress for wrongs. Such wrongs need not involve pecuniary damages and therefore may not result in damage awards from which attorneys' fees can be paid.

Although fee-shifting is an essential mechanism through which Congress has particularly encouraged protection of the civil rights of all Americans,¹⁹ fee awards have also been provided by Congress in litigation involving other areas of public concern, such as the environment (Clean Air Act, 42 U.S.C. § 7604(d)); consumer affairs (Truth in Lending Act, 15 U.S.C. § 1640(a)); and labor matters (Fair Labor Standards Act, 29 U.S.C. § 216(b)). Congress has differentiated among fee statutes as to the extent of entitlement,²⁰ thereby expressing its view that the need for fee-shifting may vary between subject areas.

¹⁹ "The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy." *Roadway Express*, 447 U.S. at 762. See Title II and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), providing in public accommodations and employment discrimination cases that the prevailing party may receive "a reasonable attorney's fee as part of the costs." Congress has included fee-shifting provisions in most recent civil rights legislation.

²⁰ For example, a fee award is mandatory under the Truth in Lending Act for a prevailing plaintiff; and is to be awarded under Title II of the Civil Rights Act of 1964 in the absence of exceptional circumstances. The House report on the subject of fee-shifting at the time of the 1976 Fees Awards Act, described the variations in some of these laws:

[T]he United States Code presently contains over fifty provisions for the awarding of attorney fees in particular cases. They may be placed generally into four categories: (1) mandatory awards only for a prevailing plaintiff; (2) mandatory

The inappropriateness of a construction of Rule 68 that defeats Congress' fee-shifting provisions is shown by examination of the purposes of those provisions. The private citizen who brings suit to enforce the civil rights laws does so not for himself alone, but as a "private attorney general" vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (footnote omitted). Congress has expressly acknowledged the significant role "private attorneys general" play in the enforcement of its policies and has long sought to encourage individuals to fulfill this critical function by authorizing the statutory award of attorneys' fees. S. Rep. No. 1011, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910 (hereinafter S. Rep. No. 1011). Failure to award attorneys' fees in such cases "would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Without counsel fees the grant of Federal jurisdiction is but a[n empty] gesture. . . ." *Hall v. Cole*, 412 U.S. 1, 13 (1973) (discussing award of attorneys' fees in a Labor-Management Reporting and Disclosure Act case).

There is, therefore, a strong and consistent congressional policy to authorize fee-shifting only when, and to the extent, that Congress finds shifting to be in the public interest. To change the definition of costs in Rule 68, as petitioners now urge, would defeat that careful congressional policy, inhibit the achievement of important national goals, and substitute uncertainty and confusion.

awards for any prevailing party; (3) discretionary awards for a prevailing plaintiff; and (4) discretionary awards for any prevailing party. Existing statutes allowing fees in certain civil rights cases generally fall into the fourth category.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5 (1976).

III. THE EXERCISE OF RIGHTS GUARANTEED BY CONGRESS THROUGH SECTION 1983 WILL BE IMPERMISSIBLY CHILLED IF RULE 68 COSTS ARE INTERPRETED TO INCLUDE ATTORNEYS' FEES

Respondents sued under 42 U.S.C. § 1983, which was derived from Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, and provides a right of action "in favor of persons who are deprived of 'rights, privileges or immunities secured' to them by the Constitution." *Carey v. Phipus*, 435 U.S. 247, 253 (1978) (citation omitted). Section 1983 "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (footnote omitted).

The Fees Awards Act was intended by Congress to ensure effective enforcement of Section 1983 and other civil rights laws "by making it financially feasible to litigate civil rights violations." *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1189 (1983) (citation omitted). Congress and the courts have recognized that civil rights litigants are often poor, and that the available judicial remedies may be non-monetary (*Mitchum v. Foster*, 407 U.S. 225) or an award of nominal damages (*Carey v. Phipus*, 435 U.S. 247).²¹ Compensatory damages, together with attorneys' fees, are intended to compensate the victim and deter violations of the civil rights laws. Civil rights legislation manifests "heavy reliance" on attorneys' fees. S. Rep. No. 1011 at 3. The important purposes of Section 1988, as well as Section 1983, would be gravely threatened if an offer of judgment made under Rule 68 could, without more, prevent

²¹ See Committee on Legal Assistance, *Counsel Fees in Public Interest Litigation*, 39 Rec. A.B. City N.Y. 300 (May/June 1984), for a recent analysis of fee awards in civil rights cases and the policy implications of such awards.

courts from exercising their discretion with respect to the award of attorneys' fees.²²

The legislative history of Section 1988 reveals continued congressional concern with the enforcement of federal civil rights laws, and a commitment to attorneys' fees awards as an "integral part of the remedy necessary to achieve compliance" with the fundamental statutory policies:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011 at 2.

This Court has recognized, as did the Senate Judiciary Committee in considering fee-shifting as a remedy in civil rights cases,²³ that the potential liability of Section 1983 defendants for attorneys' fees "provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." *Carey v. Phipus*, 435 U.S. at 257 n.11.²⁴

²² See, for example, Note, *The Offer of Judgment Rule in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 Golden Gate U.L. Rev. 963 (1980).

²³ The Senate Judiciary Committee concluded in 1976, after extensive hearings on the subject, that "the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." S. Rep. No. 1011 at 5 (emphasis added).

²⁴ Congress continues to recognize the importance of fee-shifting to ensure that there will be civil rights plaintiffs. The current Chairman of the Senate Judiciary Committee's Subcommittee on the

If petitioners' interpretation of the interplay between Rule 68 and Section 1988 were correct, these long-settled policies would be defeated. Rule 68 does not permit a court to evaluate the "value" of injunctive relief. Thus, a civil rights plaintiff presented with an early offer of judgment that included a realistic estimate of damages but no nonmonetary relief would be left seriously at risk by refusing to settle. Encouraging premature settlements of civil rights actions would, contrary to the intent of Congress, erode enforcement of civil rights and other statutes.

These problems would be compounded by simple economics. A defendant with deep pockets could use his resources to increase the plaintiff's litigation expenses by expanding discovery and engaging in extensive motion practice.²⁵ Costs and attorneys' fees would be incurred by both sides. If petitioners' view of Rule 68 prevails, and attorneys' fees and costs can be shifted to the plaintiff, the defendant with deep pockets would be able greatly to increase the plaintiff's risks of refusing a set-

Constitution, Senator Orrin Hatch, has recognized that the Fees Awards Act was intended to benefit only plaintiffs:

The legislative history of the 1976 Fees Act pointed out clearly, and correctly I think, the need for the dual standard: If the persons seeking to enforce their civil rights were faced with paying their opponents [sic] attorneys' fees if they simply did not win the case, the Fees Act would create a greater disincentive to bring these civil rights suits than the situation it attempted to remedy.

128 Cong. Rec. S4878 (daily ed. May 11, 1982).

²⁵ "[D]iscovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent." *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 523 (1980). (Dissent by Justices Powell, Stewart and Rehnquist to the adoption of amendments to the Federal Rules of Civil Procedure discovery rules).

tlement offer.²⁶ These risks may compel the plaintiff's attorney to recommend settlement even if by doing so the plaintiff abandons an opportunity to obtain important nonmonetary relief.

These dangers are illustrated by this case. The jury award in this case consisted of \$52,000 for the violation of civil rights; \$3,000 as punitive damages; and \$5,000 for wrongful death. Pet. Brief at 4. In nonmonetary terms, respondent was vindicated, and it is not unreasonable to believe that the jury verdict may have had a beneficial effect on the community involved, thereby achieving one of the congressional purposes in enacting Sections 1983 and 1988. Although the United States has characterized the offer of judgment here as "obviously reasonable" and chastized respondent for his "unreasonable failure to accept a favorable settlement," Brief of the United States at 3, neither the District Court nor the Court of Appeals suggested that the refusal of the offer was unreasonable under the circumstances. Instead, both courts recognized that new dilemmas for civil rights attorneys and their clients would be created if Rule 68 were read to preclude awards of attorneys' fees after a settlement offer higher than the ultimate jury verdict. *Chesny v. Marek*, 547 F. Supp. 542, 547 (N.D. Ill. 1982); 720 F.2d 474, 478-79 (7th Cir. 1983).

Rule 68 should not be interpreted so as to increase the pressures on civil rights plaintiffs and similar beneficiaries of fee-shifting statutes to settle, while leaving other plaintiffs subject to the Rule with the lesser burden of traditional costs. The fundamental policies behind fee-

²⁶ The "risks" of failing to settle, under petitioners' interpretation of Rule 68, might include the following: (1) the plaintiff would have to bear his own attorney's fee after the offer; (2) the public interest attorney would be unable to obtain reimbursement for time spent after the offer; and (3) defendant's costs and attorney's fees would have to be borne by the successful plaintiff. See also n.18, *infra* at p. 13.

shifting legislation should not be swept away by an artificial construction of a rule which is merely procedural. Congress did not intend that Rule 68 would be used to negate basic public policies designed to protect essential civil liberties.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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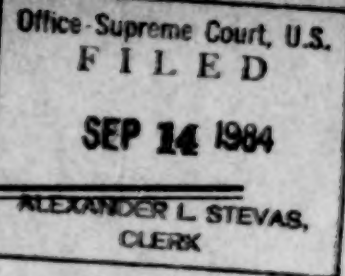
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF OF THE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AS AMICUS CURIAE**

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No. 83-1437

IN THE SUPREME COURT OF THE UNITED STATES

=====
October Term, 1983
=====

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

=====
On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit
=====

BRIEF OF THE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AS AMICUS CURIAE

=====
Interest of Amicus*

The NAACP Legal Defense and Educational
Fund, Inc., is a nonprofit corporation whose

* Letters of consent to the filing of this
Brief have been lodged with the Clerk of
Court.

principal purpose is to secure civil and constitution rights of black people. For more than forty years, its attorneys have represented parties in thousands of civil rights actions, including many significant cases before this Court. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971) ; Brown v. Board of Education, 347 U.S. 483 (1954).

A substantial percentage of LDF's current docket consists of cases involving employment discrimination, voting rights, and various constitutional and statutory claims. In these areas, prevailing plaintiffs normally are entitled to reasonable attorney's fees pursuant to various statutory fee-shifting provisions.

LDF thus believes that the Court's decision in the case at bar may significantly affect both its own ability to represent clients in future cases and the ability of victims of discrimination in general to vindicate their rights.

Summary of Argument

1. Defining the word "costs" in Rule 68 to include attorney's fees in cases involving fee-shifting is inconsistent with the purpose of the Rule and would not promote just and speedy settlements. In addition, adopting petitioner's reading of "costs" would simply redistribute the gains of settlement in favor of defendants.

2. Petitioner's construction of Rule 68 would significantly undermine Congress' intent in enacting fee-shifting statutes. Congress and this Court have made clear that prevailing plaintiffs in civil rights

actions are entitled to reasonable attorney's fees unless there are special circumstances which would render an award of attorney's fees unjust. A plaintiff's good-faith refusal of a defendant's offer of judgment simply is not such a special circumstance.

3. Including attorney's fees within the definition of costs would pose tremendous problems in class actions. The intent of the drafters of Rule 68 to prevent the court from becoming involved in the offer of judgment conflicts with the supervisory responsibilities of the court under Rule 23. Petitioners' interpretation would drive a wedge between the interests of the named plaintiff and those of the class.

4. Petitioners' construction of Rule 68 would create, at the very least, an apparent conflict of interest between plain-

tiffs and their attorneys. It would create an incentive for lawyers to counsel their clients to settle cases in order to guarantee their own fees rather than because the settlement is in fact favorable to the client.

Argument

I. PETITIONERS' CONSTRUCTION OF RULE 68 NEITHER PROPERLY INTERPRETS THE LANGUAGE OF THE RULE NOR SERVES THE POLICIES UNDERLYING THE RULE.

"The purpose of Rule 68 is to encourage the settlement of litigation," Delta Air Lines v. August, 450 U.S. 346, 352 (1981), and thus to contribute to "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Interpreting the word "costs" to include attorney's fees as well as the costs listed in 28 U.S.C. § 1920

(1982) in cases involving statutory attorney's fee-shifting provisions would not serve that goal.

Rule 68 uses the word "costs" in two contexts directly relevant to the incentives it provides for settlement. The Rule applies to offers, "with costs then accrued." Fed. R. Civ. P. 68 (emphasis added). The Rule further provides that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Id. (emphasis added).

Petitioners argue that courts should look to any definition of costs provided by a substantive statute involved in the case. Because 42 U.S.C. § 1988 (Supp. V 1981) states that "in any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised

Statutes, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1965, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," petitioners would include a prevailing plaintiff's post-offer attorney's fees within the costs which the plaintiff must bear if the defendant's offer exceeds his ultimate recovery at trial. As the Court of Appeals noted in this case, such a conclusion "rests on [a] rather mechanical linking up" of the two provisions. Chesny v. Marek, 720 F.2d 474, 478 (7th Cir. 1983).

A. The Language of Rule 68 Does Not Permit the Equation of "Costs" Under the Rule with "Costs" as Used in Fee-Shifting Statutes.

In Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), this Court held that the attorney's fees provisions in §§ 1988 and

2000e-5(k) should not be incorporated into 28 U.S.C. § 1927 (1976; codified as amended, 1982), which permits a court to tax the excess costs of a proceeding against a lawyer who multiplies the proceedings unreasonably and vexatiously. The Court rested its rejection of the "superficially appealing argument" that the non-defined "costs" mentioned in § 1927 could be given meaning by reference to §§ 1988 and 2000e-5(k), 447 U.S. at 758, on a number of considerations applicable to the case at bar.

To paraphrase Piper, petitioner's construction of Rule 68 and § 1988 "could introduce into the [Rule] distinctions unrelated to its goal ... and could result in virtually random application of [Rule 68] on the basis of other laws that do not address the problem of controlling abuses of

judicial processes." 447 U.S. at 761-762. It would make little sense to interpret Rule 68 in a way that gives significant weight to those insignificant variations.

For example, many employment discrimination cases alleging bias on the basis of gender are brought under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982). The attorney's fees provision of Title VII allows prevailing plaintiffs to recover fees "as part of the costs" of suit. 42 U.S.C. § 2000-5(k). The provision of the Fair Labor Standards Act applicable to Equal Pay Act claims, however, directs the court to award "a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b) (1982) (emphasis added). It would be absurd to argue that a prevailing

plaintiff should not recover that part of his post-offer fees expended on a Title VII claim while he should recover that part involved in an Equal Pay Act claim.

Such an approach would fly in the face of this Court's recognition in Hensley v. Eckerhart, ____ U.S. ____, 76 L.Ed.2d 40, 51 (1983), that many civil rights cases "involve a common core of facts or will be based on related legal theories" which make it inappropriate for a court to apportion an attorney's fees request among various claims on a mechanical basis. Rule 68 simply cannot be read to toll the defendant's liability for fees for the Equal Pay Act claim, since they are not "costs." Thus, a defendant's claim that a prevailing plaintiff's fees should somehow be reduced would embroil the judge in a parsing exercise based on fine linguistic variations which Petitioners'

argument in this case transforms into artificial bright-line distinctions. Surely, there is no logical reason to suppose that the judicial system should be more eager to induce settlement of Title VII sex-discrimination claims that of virtually identical Equal Pay Act causes of action.

Furthermore, this Court's decision in Roadway Express, like its decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), reserved for Congress the delicate duty of determining how prevailing plaintiffs' attorney's fees should be affected by general, procedural provisions. See Act of Sept. 12, 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1156 (codified at 28 U.S.C. §1927 (1982)), (amending § 1927 to include "attorney's fees reasonably incurred" as well as "costs"). In addition, unlike Rule 68, Fed. R. Civ P. 37(b), which

concerns sanctions for a party's failure to comply with discovery orders, explicitly provides that the court shall normally assess "the reasonable expenses, including attorney's fees, caused by the failure [to comply]."

The recent proposal by the Advisory Committee on Civil Rules to amend Rule 68 to include attorney's fees in all cases adds support to the inference that the Rule does not currently view fees as costs. The proposed amendment provides that an offeree who recovers less than the offer "must pay the costs and expenses including reasonable attorney's fees, incurred by the offeror after the making of the offer...." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Rule 68 Offer of Settlement, 98 F.R.D. 337, 362 (1983) [hereinafter cited as Proposed Rule

68] (new material in italics). If the term "costs" necessarily included attorney's fees, then the addition of the phrase "and expenses including ... fees" would have been unnecessary. The drafters' inclusion of "and expenses including ... fees" therefore supports the inference that "costs" as it now stands refers solely to the traditional costs defined in 28 U.S.C. § 1920. Thus, "costs" under Rule 68 has retained its "technical" meaning, while "costs" under §§ 1988 and 2000e-5(k) has been broadened to include the actual expenses of litigating a case. Cf. Freedom of Information Act, 5 U.S.C. § 522(a) (4) (E) (1982) (providing for award of "reasonable attorney's fees and other litigation costs reasonably incurred").

The proposed amendment also would eliminate the requirement that a Rule 68 offer include costs. The Advisory Committee Note explains this deletion by referring to the confusion which the inclusion of the requirement would cause if read in conjunction with fee-shifting statutes' definitions of "costs." Proposed Rule 68, 98 F.R.D. at 364. This confusion would also arise if petitioners' erroneous construction of the Rule is adopted. If attorney's fees are not viewed as part of the costs to which Rule 68 applies, then there is no problem. As this Court noted in Roadway Express, from the very outset Congress has sought "to standardize the treatment of costs in federal courts, to 'make them uniform --make the law explicit and definite.'" 447 U.S. at 761 (quoting H.R. Rep. No. 50, 32d Cong. 1st Sess. 6 (1852)). The aim of uniformity

embodied in Congress' intent and the Federal Rules of Civil Procedures would best be served by defining costs in Rule 68 proceedings identically in all cases.

B. Petitioners' Construction of Rule 68 Would Not Promote Increased Settlement.

Petitioners' argument assumes that the allowance or disallowance of post-offer counsel fees will only affect plaintiffs' decisions whether to accept settlement offers or continue to trial. This exclusive concentration on the way in which Rule 68 influences plaintiffs' incentives to accept an offer ignores the deterrent effect petitioners' proposal will have on defendants' decisions to make settlement offers.

Through an offer of settlement, the defendant can fix his liability at a certain sum and, he hopes, pay less than he would be

found liable for at trial. Thus, a key factor in a party's decision about settlement is his assessment of his prospects should the case go to trial. Under the rule enunciated by the Seventh Circuit in Chesny, this would be the sum of the present expected value of the plaintiff's recovery on the merits and the present expected value of the plaintiff's reasonable attorney's fees (discounted, of course, by the likelihood of the plaintiff's prevailing). The defendant has a strong incentive to settle the case for any amount less than this sum plus his costs of going to trial, an amount he will subjectively determine. The cost-shifting scheme embodied in § 1988 contributes to the pressure on defendants to settle. See Hensley v. Eckerhart, ____ U.S. ____, 76 L.Ed.2d 40, n.2 (1983) (Brennan, J., concurring in part and dissenting in part);

Dennis v. Chang, 611 F.2d 1303, 1307 (9th Cir. 1980). In negotiations, the plaintiff, who does not know the defendant's subjective assessment, will try to drive the defendant's maximum offer up until it exceeds the plaintiff's subjective assessment.

The effect of petitioners' proposal would simply be to shift the "price range" within which settlement negotiations take place. A defendant will make a lower offer to a plaintiff, since the expected value of his liability to the plaintiff will decrease by the amount of the plaintiff's post-offer attorney's fees should the plaintiff recover less at trial. A plaintiff's demands also will decrease, since the cost of proceeding to trial will now also include that part of his attorney's fees which he cannot recover if the offer exceeds the judgment he obtains

after trial. That such a shift occurs, however, says absolutely nothing about whether the gap between a plaintiff's minimum demand and a defendant's maximum offer --which determines whether there will be a settlement --will become wider or narrower.

Thus, the primary effect of Petitioner's construction would be distributive: since the price of settlement offers will decrease, defendants will retain more and plaintiffs will receive less. There is absolutely nothing in Rule 68 to suggest, however, that it or the rules of civil procedure in general are intended to distribute the amount at issue in a lawsuit in the defendant's favor. Indeed, the only cases which petitioner's construction would affect are precisely those in which there is a clearly articulated Congressional policy

favoring plaintiffs. See infra Section II. Thus, because petitioners' interpretation of Rule 68 is "indifferent to the equities of a dispute and to the values advanced by the substantive law," Roadway Express, Inc. v. Piper, 447 U.S. at 762, it must be rejected.

II. PETITIONERS' CONSTRUCTION OF RULE 68 WOULD UNDERMINE THE CLEAR CONGRESSIONAL POLICIES EMBODIED IN FEE-SHIFTING PROVISIONS IN CIVIL RIGHTS CASES.

In deciding to enact § 1988 following the decision in Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), Congress clearly stated its belief that attorney's fees to prevailing parties play a critical role in civil rights cases: "One aspect of complete relief is an award of attorney's fees which Congress considered necessary for the fulfillment of federal goals." New York Gaslight Club, Inc. v. Carey, 477 U.S. 54, 67-68 (1980); see S. Rep

NO. 1011, 94th Cong., 2d Sess. 5 (1976). There are three principles which must inform the award of fees. First, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 76 L. Ed.2d at 49; see Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam); S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3 (1976). Second, a prevailing plaintiff's fee must be reasonable. Hensley, 76 L.Ed.2d at 50. Third, a defendant is entitled to recover his fees from a plaintiff under § 1988 only "where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 76 L.Ed.2d at 48, n.2.

As this Court noted in Christiansburg Garment Co., even "a moment's reflection" explains this differential treatment of prevailing plaintiffs and defendants: "First, ... the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." 434 U.S. at 418. Petitioner's arguments as to how Rule 68 should operate in civil rights cases ignores these concerns.

A. The Current Standard for Awarding Counsel Fees in Civil Rights Cases Better Serves the Purposes of § 1988.

Recently in Hensley v. Eckerhart, this Court clarified the proper relationship of the results obtained to an award of attorney's fees. Petitioner's construction

of Rule 68's relationship to § 1988 is inconsistent with the considerations enunciated in Hensley.

Hensley set out the process by which a trial court should assess a prevailing plaintiff's request for counsel fees. "The most useful starting point ... is the number of hours reasonably expended multiplied by a reasonable hourly rate." 76 L.Ed. 2d at 50. In determining the number of hours reasonably expended, the district court should exclude "excessive, redundant, or otherwise unnecessary" hours. Id. at 51; see Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc).

The district court may adjust this "lodestar figure to reflect the degree of a plaintiff's success." 76 L.Ed.2d at 52.

This Court made clear, however, that such a reduction should not be based on any mechanical formula. Id. at 52, n. 11.

The Court "reemphasize[d] that the district court has discretion in determining the amount of the fee award. This is appropriate in view of the district court's superior understanding of the litigation," id. at 53 and stressed the undesirability of having the request for counsel fees "result in a second major litigation," id.

1. Petitioners' Standard Would Improperly Deny the District Court Discretion in Awarding Fees

Hensley focuses on the reasonableness of a prevailing plaintiff's request, given all the circumstances. In contrast,

petitioners' approach totally ignores the individual circumstances of particular cases.

A district court's evaluation of a reasonable attorney's fee is made within the context of the Congressional purpose that courts award fees adequate to insure the competent representation of civil rights plaintiffs. Petitioner in this case would scrap this fact- and policy-bound inquiry in favor of a mechanical rule that would hold all post-offer expenditures of time by a plaintiff to be irrebuttably unreasonable. Unlike § 1988, or, for that matter, Rule 54, Rule 68 requires a less-successful offeree to pay costs incurred after the offer; it affords no discretion to the trial judge. As this Court noted in Delta Air Lines,

however, such discretion is critical to the entire cost-allocation scheme. 450 U.S. at 353-55.

This Court decisively rejected such an irrebuttable presumption in Christiansburg Garment Co., 434 U.S. at 422. Such a presumption should also be rejected here. If, under Christiansburg Garment Co., a losing plaintiff cannot be forced to bear his opponent's costs simply because he has lost, the case against requiring a winning plaintiff to pay what would otherwise be the defendant's obligation simply because he made an erroneous guess about his recovery at trial is all the more compelling.

Moreover, petitioners' construction of Rule 68 would impair the accuracy of a plaintiff's assessment of a defendant's offer by encouraging a defendant to make a very early offer. If the offer is made

before the plaintiff has completed discovery, it both requires the plaintiff to evaluate the merit of the offer without adequate information and places the plaintiff at risk of being liable for all his own fees if discovery shows that he is unlikely to be more successful at trial.

Finally, in a manner contrary to the principles of the fee-shifting statute, Petitioner's proposed mechanical standard would work unfairly in many civil rights actions. As Christiansburg Garment Co., notes, the law in many areas of antidiscrimination may change substantially between the time a suit is filed and its ultimate determination. Thus, at the time the offer was made, the plaintiff might have been entitled to all the relief he was seeking, given the facts adduced at trial. By the time of trial, however, standards may

have changed in a way that denies plaintiff some of that relief. Even though the results plaintiff has achieved under the new standard are "excellent," Hensley, 76 L.Ed.2d at 52, and worth the expenditure of hours spent, they may not be equal to the defendant's earlier offer. If the fees incurred are consonant with the result achieved, it would be unreasonable to deny those fees merely because plaintiffs could have done better than the law allows. Additionally, the 1946 amendments to Rule 68 make clear that a defendant whose first offer was not accepted may make additional offers: "In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained." Advisory Committee Note, Fed. R. Civ. P. 68. If, however, a

plaintiff's attorney advises him to reject an offer, the plaintiff follows that advice and the defendant makes a new, higher offer, then the plaintiff's initial refusal was clearly reasonable, whatever the merits of his additional refusals. Thus, to disallow the attorney's fees involved in attempting to extract a better settlement offer from a defendant who offers an unacceptably low amount the first time around would compel plaintiffs to settle for less than their claims are really worth.

Overall, then, by ignoring the reasonableness of the parties' actions and forbidding the proper exercise of judicial discretion under § 1988, Petitioners' interpretation undermines this Court's longstanding approach to the award of attorney's fees.

2. Petitioners' Construction of Rule 68 Would Result in Increased Litigation Over Attorney's Fees.

There are two reasons why adopting petitioner's interpretation of Rule 68 would increase the already substantial amount of fee-award litigation now occupying the courts. Petitioners' interpretation provides defendants' with an incentive to litigate such questions, and it involves application of an extraordinarily complex standards which will encourage appeals from trial court's findings.

If petitioners' reading of the Rule were adopted, a defendant would have to be a fool not to make some offer in every case involving fee-shifting, since that offer, no matter how low, would automatically toll the accumulation of attorney's fees if

the plaintiff was less successful at trial. increase the already substantial amount of fee-award litigation now occupying the courts. Petitioners' interpretation provides defendants with an incentive to litigate such questions, and it involves application of an extraordinarily complex standard which will encourage appeals from trial court's findings.

If petitioners' reading of the Rule were adopted, a defendant would have to be a fool not to make some offer in every case involving fee-shifting, since that offer, no matter how low, would automatically toll the accumulation of attorney's fees if the plaintiff was less successful at trial. Thus, in every case in which the plaintiff is not wholly successful in prevailing on all his claims, a defendant may claim release from post-offer fees. This type of

claim will be particularly prevalent whenever the cost of litigating this issue is likely to be less than the costs of paying the additional attorney's fees the plaintiff claims.

This temptation to litigate will be exacerbated by the complexity of many civil rights cases. Rule 68 may be well designed for cases involving purely monetary claims. It is easy to see that an offer of \$50,000 plus costs is more favorable to the offeree than an ultimate recovery of \$25,000 plus costs. As this Court noted in Hensley, however, it is far more difficult to assess the relative merits of various "packages" of relief which involve non-pecuniary recovery. The Senate Report accompanying the enactment of § 1988 makes crystal clear that attorney's fees in civil rights cases should not be affected by the non-pecuniary nature

of the rights involved. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). Thus, to elaborate upon the Court's example in Hensley, 76 L.Ed.2d at 52 n.11, suppose that a plaintiff sued for \$10,000 in damages and an injunction stopping certain allegedly unconstitutional prison practices. If the defendant offered the plaintiff \$5,000 in damages, but refused to agree either that it had violated his constitutional rights or that it would discontinue the practices, the plaintiff might well refuse the offer. Suppose at trial the plaintiff is unable to prove actual damages and therefore is entitled only to nominal damages of \$1, see Carey v. Piphus, 435 U.S. 247, 266 (1978),

but he succeeds in proving the unconstitutionality of the practice and in obtaining an injunction. It is undoubtedly clear that the plaintiff is a prevailing party within the meaning of § 1988. See Hensley, 76 L.Ed.2d at 50; McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983) (upholding award of fees in a similar case). It is far less clear, however, that every district court would hold that such a plaintiff was more successful at trial than he would have been had he accepted the defendant's offer. Thus, even though the defendant knows that the plaintiff will be entitled to some fee award, he has an incentive to challenge post-offer fee requests on the ground that the plaintiff did not prevail by enough.

B. The Proposed Standard Undermines the Substantive Goals of the Civil Rights Laws.

For nearly twenty years this Court has recognized that enforcement of the civil rights laws depends on private litigation and that when a civil rights plaintiff prevails, "he does not do so for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enterprises, 390 U.S. at 402. The Senate Report accompanying the passage of § 1988 put the matter bluntly:

All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain..... "Not to award counsel fees ... would be tantamount to repealing the [civil rights] laws [themselves] by

frustrating their basic purpose...." Without counsel fees the grant of Federal jurisdiction is but an empty gesture.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 3 (1976) (citations omitted).

Petitioners' construction of Rule 68 would undermine this explicit Congressional concern in two ways: First, it will deter plaintiffs from vigorously pursuing vindication of their personal interests in nondiscriminatory treatment, such as backpay or reinstatement. Second, it will create a dangerous incentive for an individual plaintiff to compromise the wider public interests involved in his particular case. Because of these adverse effects on the substantive ends of civil rights law, Petitioners' interpretation of Rule 68 runs afoul of the Rules Enabling Act.

1. Petitioners' Reading of Rule 68 Will Deter Plaintiffs from Pursuing Meritorious Claims.

As the Second Circuit noted, "[t]he standard by which [courts] allocate counsel fees between a victorious litigant and his opponent can have a substantial effect on settlement negotiations, and, indeed, on a prospective plaintiff's very decision to bring suit." Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1027 (2d Cir. 1979). The legislative history of § 1988 clearly recognized that individuals who alleged the violation of their civil rights "must have the opportunity to recover what it costs them to vindicate these rights in court.... If the cost of private enforcement becomes too great there will be no private enforcement." S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 6 (1976).

Petitioners' position would raise these costs because it penalizes plaintiffs twice for rejecting a settlement offer. The plaintiff has already lost the difference between the value of the offer and his less valuable recovery at trial. The danger of such a result already provides an incentive for plaintiffs to settle. It is important to note, however, that the danger of a lesser recovery on the merits is directly tied to the merits of a plaintiff's claim. Thus, forcing the plaintiff to bear this risk serves the Constitutional and Congressional purposes embodied in antidiscriminatin laws.

By contrast, forcing a prevailing plaintiff to bear his own post-offer attorney's fees in the mechanical fashion Petitioners propose imposes a penalty on plaintiffs which may be totally unrelated to

the merits of their cases. Many civil rights plaintiffs are persons of extremely modest means who could not possibly afford the costs of litigating their claims. In normal contingent-fee litigation, where solely monetary damages are concerned, a plaintiff's impecuniousness does not pose an insuperable barrier; a plaintiff can execute an agreement dividing his recovery between himself and his lawyer. The lawyer who has been approached to represent the plaintiff decides to take the case and what percentage of the recovery to demand by assessing the probabilities of various outcomes.

In contrast to the present case, in many civil rights cases monetary damages are either insignificant or unavailable. See Hensley v. Eckerhart, 76 L.Ed.2d 58 at n.5 (Brennan, Marshall, Blackmun, & Stevens, JJ., concurring in part and dissenting in

part); Carey v. Piphus, 435 U.S. at 266; Newman v. Piggie Park Enterprises, 390 U.S. at 402. In such cases, a contingency fee could never prove adequate to induce lawyers to undertake representation of plaintiffs, since the benefit of any injunction or declaration of constitutional principle are not monetary, and therefore cannot be apportioned between the attorney and his client. The legislative history of § 1988 clearly states that the nonpecuniary nature of rights involved should not affect a plaintiff's ability to recover attorney's fees, S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), and, by implication, a plaintiff's ability to pursue his case. Petitioner's construction of § 1988 would impair a civil rights plaintiff's effective vindication of his rights precisely because those rights are nonpecuniary. Such a plaintiff simply

cannot obtain representation by splitting his recovery with his attorney: his recovery is nondivisible and nontransferable.

Moreover, in order to compensate for the possibility that, although they prevail, their clients will not recover any monetary damages, attorneys are likely to demand a higher proportion of a plaintiff's potential recovery as their contingent fee. Even in cases where plaintiffs fully recover, they will retain less of their award. Petitioners' construction thus will both adversely affect prevailing plaintiffs who do not fall within Rule 68's orbit and reallocate the potential gains of a case away from plaintiffs and toward attorneys. Both these results "substantially add to the risks" inhering in civil rights cases and thus "undercut the efforts of Congress' to

provide plaintiffs with a means of fully realizing their constitutional rights. Christiansburg Garment Co., 434 U.S. at 422.

2. Petitioners' Reading of Rule 68 Conflicts with the Central Role of "Private Attorneys General" in the Enforcement of the Civil Rights Laws.

Deterring an individual plaintiff from pursuing his case not only prevents him from vindicating his own rights; it also prevents him from vindicating wider interests in nondiscrimination, both those of third parties who will be benefited by whatever declaratory or injunctive relief is obtained and those of the nation at large in the vigorous enforcement of the civil rights laws (see Newman v. Piggie Enterprises, Inc. supra). Petitioners' construction of Rule 68 gives rise to two dangers: first, it forces individual plaintiffs to bear the total risk

of continuing to litigate after a Rule 68 offer even though they will not retain the full benefit of such a decision; second, it creates an incentive for plaintiffs to accept settlements which benefit them but compromise the wider interests involved.

Justice Brennan's opinion in Hensley pointed out that "[c]ivil rights remedies often benefit a large number of persons, many of them not involved in the litigation, making it difficult both to evaluate what a particular lawsuit is really worth to those who stand to gain from it and to spread the costs of obtaining relief among them." 76 L.Ed.2d at 58 n.5. In the context of petitioners' argument on Rule 68, this means that it will often be difficult to put an actual value on either the defendant's offer or the plaintiff's ultimate recovery -- both essential measures for employing the Rule --

and that an individual plaintiff will be unable to recoup the attorney's fees petitioners' position would force him to bear, although other parties will benefit from whatever systemic relief is obtained and would have benefited from whatever systemic relief is obtained and would have benefited even more from the plaintiff's gamble had it paid off. "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich [or fail to charge] the others unjustly at the plaintiff's expense." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970).

Under petitioners' construction of the Rule, a plaintiff presented with an offer is faced with not only the risk of continuing to litigate, but also the risk of how a judge will evaluate his assessment of those

risks of litigation. This enhanced risk to plaintiffs presents them with an incentive to accept a defendant's offer which provides them with some personal relief even though it completely ignores the interests of the public. Because the plaintiff cannot recover his post-offer fees, either from the third parties who would have shared his gain or from the losing defendant, he will be especially reluctant to incur these expenses.

Petitioners' interpretation thus enhances a defendant's opportunity to "buy off" a private attorney general and frustrates the wider purposes of antidiscrimination law. A defendant's offer to a plaintiff of \$10,000 may leave the plaintiff better off, but if it leads the plaintiff not to litigate a case which would have awarded the plaintiff \$5,000 and an injunc-

tion against unconstitutional discrimination, it may be an inferior outcome both for the plaintiff and for the public. Moreover, because Rule 68 contemplates no judicial involvement in the settlement process, "except in a proceeding to determine costs," there is no opportunity for an independent judge to safeguard the public interests that prompted fee-shifting legislation in the first place. See Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).¹

3. Petitioners' Interpretation of Rule 68 Is Inconsistent with the Rules Enabling Act.

The Rules Enabling Act, 28 U.S.C. § 2072 (1982), provides that rules of procedure "shall not abridge, enlarge or

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Petitioners' interpretation of Rule 68 would create even greater dangers in class actions brought under Fed. R. Civ. P. 23 See infra Section III.

modify any substantive right...." While "the line between 'substance' and 'procedure' shifts as the legal context changes," Hanna v. Plumer, 380 U.S. 460, 471 (1965), Petitioners' construction of Rule 68 poses a substantial danger of abridging plaintiffs' substantive constitutional and statutory rights.

Attorney's fees are a component of complete relief to which prevailing plaintiffs are entitled. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67-68 (1980). By changing the standard under which such fees are awarded, petitioners' interpretation would both "abridge" and "modify" plaintiffs' rights, as the lower court noted in this case. Chesny v. Marek, 720 F.2d at 479-80.

Indeed, the way in which even courts which have adopted petitioners' approach limit the Rule in order to exclude a defendant's attorney's fees from "costs" implicitly concedes the substantive nature of an attorney's fees award. In Chesny itself, the District Court held that "a 'no' answer is readily reached" to the question whether a defendant's fees fall within the Rule. Chesny v. Marek, 547 F. Supp. 542, 547 (N.D. Ill. 1982). The court explained its decision by claiming that defendants who have lost are not prevailing parties under § 1988. Id. This reading is disingenuous. It is only by viewing the defendant as having "prevailed" in the post-offer stage of the litigation, and the plaintiff as having "lost," that the defendant is entitled to place on plaintiff a burden --the payment of a prevailing plaintiff's fees --he would

otherwise have to bear. However, there is no principled distinction between the "substantive" shifting of defendants' fees and the allegedly "procedural" device petitioners support.

This Court should interpret Rule 68 to avoid the substantive impairment Petitioners' construction would engender. Excluding fees from "costs" covered by Rule 68 would best serve the clearly enunciated congressional goals of antidiscrimination law.

III. PETITIONERS' INTERPRETATION OF RULE 68 CONFLICTS WITH THE POLICIES CONCERNING CLASS ACTIONS EMBODIED IN RULE 23.

This Court has repeatedly recognized that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs." E.g., General Telephone Co. v.

Falcon, 457 U.S. 145, 157 (1982); East Texas Motor Freight System v. Rodriguez, 431 U.S. 395, 405 (1977). The class action lawsuit is a logical extension of the concept of private attorneys general in civil rights cases. Class actions often afford plaintiffs who would not otherwise be able to obtain representation a chance to have their claims presented. Petitioners' interpretation of Rule 68, however, conflicts with both the broad purposes of class action civil rights litigation and the narrow procedural requirements of Rule 23. In particular, petitioners' interpretation will undermine Rule 23(a) (4)'s requirement that "the representative parties ... fairly and adequately protect the interests of the class" and creates problems with Rule

23(e)'s provision that "a class action shall not be dismissed or compromised without the approval of the court...."

A. Petitioners' Construction of Rule 68 Will Create Conflicts of Interests Between Representatives and Class Members.

As currently written, Rule 68 makes no distinction between individual and class actions. In proposing that the Rule be amended to include attorney's fees the Advisory Committee specifically exempted Rule 23 and 23.1 actions from its orbit. The Committee explained its recommendation by pointing out that "[an] offeree's rejection would burden a named representative-offeree with the risk of exposure to heavy liability for costs and expenses that could not be recouped from unnamed class members.... [This] could lead to a conflict of interest between the named representative and other

members of the class." Proposed Rule 68, 98 F.R.D. at 367. The only court to discuss the interaction between Rule 23 and Rule 68 explained its decision not to apply Rule 68 in similar terms. Rule 68 is intended to be coercive, that is, to push plaintiffs to accept settlement offers but "the same coersiveness that, when directed against a party suing in his own behalf, serves the purpose of judicial economy by raising the ante has an added effect in a class action: it introduces a potential conflict between the named party's self-interest and his fiduciary duty to the class." Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 502 (N.D. Cal. 1980). The named plaintiff can avoid any exposure for the class' attorney's fees by accepting a settlement; he faces overwhelming obligations if he refuses the offer and the class

recovers less at trial, obligations which he cannot force the class members to share. The named plaintiff thus faces a powerful incentive to negotiate for and accept a settlement which affords him the maximum individual relief possible, regardless of whether the settlement sacrifices the class' interests. A named plaintiff who pursues his interests in this fashion cannot meet the adequate representation requirement of Rule 23(a) (4). See Hooks v. General Finance Corp., 652 F.2d 651, 652 (6th Cir. 1981) (per curiam).

In most cases in which a particular proposed representative is rejected because of a potential or actual conflict with the unnamed class members, another member of the class can adequately represent the common interests involved. Petitioners' interpretation in this case is particularly

pernicious because every potential representative faces this conflict of interest. The Court should therefore reject a construction of Rule 68 which needlessly exacerbates the tensions between class representatives and their members.

B. The Application of Rule 68, as Interpreted by Petitioners, to Class Actions Would Be Inconsistent with the Requirements of Rule 23(e).

Rule 23(e), which requires the court's approval before a class action is compromised, is designed "to protect non-party members of a class ... from unjust or unfair settlements affecting their rights by representatives who lose interest or are able to secure satisfaction of their individual claims by compromise." Moreland v. Rucker Pharmacal Co., 63 F.R.D. 611, 615 (W.D. La. 1974); see Nesenoff v. Muten, 67

F.R.D. 500, 502 (E.D.N.Y. 1974). In short, Rule 23(e) is designed to guard against the dangers to which Petitioner's interpretation of Rule 68 would give rise.

The specific requirements of Rule 68, however, cannot be smoothly integrated into the framework of judicial oversight established by Rule 23. First, Rule 68 explicitly contemplates no judicial involvement in the settlement acceptance process. See Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978). If a plaintiff accepts the defendant's offer, then either party may file the offer "and thereupon the clerk shall enter judgment." Fed. R. Civ. P. 68 (emphasis added). Thus, there is no mechanism under Rule 68 for safeguarding the rights of class members. Rule 68 would therefore have to be abrogated in some respects in order to satisfy Rule 23(e).

Essentially, Rule 23(e) requires a judicial hearing to consider the reasonableness of an offer and a plaintiff's acceptance. But Rule 68 does not require any showing of reasonableness by a party. See Delta Air Lines v. August, 450 U.S. at 349-50. If reasonableness is a criterion, however, it should be as relevant to the refusal of an offer as it is to its acceptance. Importing a reasonableness standard into Rule 68 determinations would render the rule superfluous. See supra Section II.A.

Second, Rule 68 sets an explicit ten-day limit on how long an offer may remain open. See Staffend v. Lake Central Airlines, 47 F.R.D. 218 (N.D. Ohio 1969). There is no way that a plaintiff can conscientiously determine whether or not to accept a settlement offer in a case involving complex claims of relief and many

claimants in so limited a period of time. Nor is ten days sufficient time in which to give notice to class members of a pending settlement or for them to respond. Again, some allowance for Rule 23's concerns must be made.

Finally, if a named plaintiff is willing to settle a case, whatever the terms, it cannot be the law that if a judge rejects the settlement pursuant to his power under Rule 23(e), the named plaintiff is still responsible for fees incurred after the offer. To interpret Rule 68 as still requiring the plaintiff to bear the costs does nothing to further the Rule's goal of encouraging settlement, since the plaintiff cannot settle the case without other parties' consent. Such an interpretation would deter class action litigation and

would result in multiple lawsuits, increasing the costs to plaintiffs, defendants, and the courts alike.

Making exceptions to Rule 68 for class actions would, however, encourage some plaintiffs unnecessarily to couch their cases as class actions. This too would result in added litigation costs since the procedural requirements for certification, to name one example, add time and expense. Thus, Rule 68 should be interpreted to avoid these dangers.

IV. PETITIONERS' CONSTRUCTION OF RULE 68 WOULD SIGNIFICANTLY IMPAIR THE ATTORNEY-CLIENT RELATIONSHIP.

Petitioners' interpretation of Rule 68 creates a dangerous potential for apparent conflicts of interest. If the Rule's definition of "costs" includes attorney's fees, then a valid settlement offer must

include some provision for such expenses. See Delta Air Lines v. August, 450 U.S. at 365 (Powell, J., concurring); Scheriff v. Beck, 452 F. Supp. at 1260. An attorney whose client is given an offer of judgment under the Rule therefore is faced with a choice: if his client accepts the defendant's offer, then he will be guaranteed a reasonable attorney's fee, but if his client rejects the offer, he may be unable to recover any of his post-offer fees, regardless of the reasonableness of the client's decision to turn down the offer or how successful he is at trial.

This poses two dangers. First, when a lawyer counsels his client to accept an offer, it may appear that his advice stems more from a desire to ensure that his fee will be paid than from a belief that the settlement is in his client's best

interests. This appearance of impropriety, and a plaintiff's awareness of the potential compromise of his interests, may well impede the settlement process, since clients may refuse even reasonable offers because they mistrust their attorneys' advice.

Second, it encourages a plaintiff's lawyer to treat his compensation as one of the initial subjects of negotiation. Although attorney's fees are formally awarded to the prevailing party, they are in reality granted to the counsel. Accordingly, it has been ruled "improper for a lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions." Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978).

In run-of-the-mill, individual contingent-fee litigation, these dangers do not loom so large. A plaintiff can tie his lawyer's recovery directly to his own success and thus avoid a shift of resources within the recovery pool. Cf. Chesny v. Marek, 720 F.2d at 477-78.

In both nonpecuniary damages cases and class actions, however, there is no simple way to guard against a lawyer's serving his self-interest first. Cf. Prandini v. National Tea Co., 557 F.2d 1015, 1020 (3d Cir. 1977). In cases involving non-monetary claims, the client cannot tie his attorney's payment to the amount of his recovery. It will often be unclear to him whether his attorney has traded off some of his injunctive or declaratory relief in return

for a higher fee. See Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980).

This problem is exacerbated in class actions. A defendant who is interested in settling the total claim against him will be indifferent to the allocation of the total pool between the class and its attorney. Prandini, 557 F.2d at 1020. There is a tremendous danger that both sides will agree to a "sweetheart" arrangement under the defendant will pay the named plaintiff and his lawyer enough to satisfy them, and they will sell out the interests of the rest of the class. Id. at 1021.

Both the Third and the Ninth Circuits have held that it is a plaintiff's attorney's ethical duty to resolve the plaintiff's substantive claims before negotiating his fees. See Mendoza, 623 F.2d

at 1353; Prandini, 557 F.2d at 1021; Cf. Manual for Complex Litigation, part I, § 1.46, at 75 (1982). An interpretation of Rule 68 which compels defendants to include counsel fees in the negotiations in order to benefit from the Rule's coercive power and which does nothing to protect plaintiffs from sweetheart deals should be rejected.

As the Court of Appeals recognized below, the potential for conflicts of interest exists whenever a lawyer's fee is contingent. Chesny v. Marek, 720 F.2d at 447. There is no justification, however, for exacerbating that tension in order to induce plaintiffs to settle. The justness of a settlement is as important as the speed with which it is achieved.

CONCLUSION

The decision of the Seventh Circuit

should be affirmed.

Respectfully submitted,

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